SUPREME COURT

Digest, Practice & Procedure

(1950-1955)

BEING

A Complete Digest of all Cases reported in various Law Journals and Reports from January 1950 till April 1955, together with Supreme Court Practice and Rules of Procedure as amended up-to-date and a Supplement containing Digest of Supreme Court Cases from April to December 1955, Alphabetical list of Cases included and digested with parallel references to various Reports and Journals and list of cases overruled.

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SUPREME COURT

DIGEST, PRACTICE & PROCEDURE

(1950-1955)

PREFACE

The importance of the decisions of the Supreme Court cannot be under-rated. Under the Constitution of India, it is not only the final Court of Appeal in India, but is also the Court for enforcement of the Fundamental rights guaranteed by Part III of the Constitution. The law declared by the Supreme Court shall, in view of Article 141, be binding on all Courts within the territory of India. The number of law points decided by this Great Court of Justice in India, during the period referred to above, has been enormous. A complete and well arranged Digest of this volume of Case-law should, therefore, be a boon not only for the busy Practitioners in the Supreme Court but also for the lawyers practising at the High Court Head Quarters and in the muffasil. Besides it should be an invaluable guide for all High Courts and Subordinate Courts in India.

Part I of this Book is a Comprehensive Digest arranged according to various headings and sub-headings of different enactments and other topics. The Editor has spared no pains in making it complete and up-to-date. The Case-law available till April 1955 has been included in the Digest and the Cases from April to December 1955 will be given separately in the form of Supplement in January 1956.

Part II of the Book contains Rules of the Supreme Court as amended up-to-date, together with useful notes and references to the Code of Civil Procedure, with a view to make this Part

self-sufficient and useful. It has not been thought advisable to burden this Part with Case-law referred to in Part I of the Book, to avoid repetition. Amendments in Rules, if any, made till 31-12-1955 will be included in the Supplement mentioned above.

The Book, it is hoped, will be extremely useful to the Profession, Law Libraries and Law Courts. Any suggestion for its further improvement will be welcomed by the Editor.

In the end, I feel that an apology is perhaps needed for a little delay in the publication of the Book. A little more time than originally estimated has, however, enabled me to improve it materially. I am grateful to the Profession for their kind appreciation and patronage, which has been overwhelming, even while the Book has been in the Press. This has been a great source of encouragement indeed. My thanks are also due to the Printers for the neat and fine execution of the work and its excellent get up.

A. N. KHANNA.

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SUPREME COURT
DIGEST, PRACTICE & PROCEDURE

1950-1955

PART I

SUPREME COURT DIGEST

ABDUCTED PERSONS (RECOVERY AND RESTORATION) ACT 1949 (LXV OF 1949)

(1) Act not *ultra vires* Act LXV of 1949 is not inconsistent with Art. 15, Art. 19 (1) (d), (e) & (g) and Art. 21 of the Constitution of India and is not, therefore, *ultra vires* the Constitution of India. *State of Punjab* v. *Ajaib Singh*,

A I R 1953 S C 10 (16) =1953 S C R 254=1952 S C J 664.

(2) *S. 4 not* ultra vires — *Restraint on abducted person is not "arrest" within meaning of Art. 22 — Constitution of India, Art. 22 (1) and (2).*

Broadly speaking, arrests may be classified into two categories, namely, arrests under warrants issued by a Court and arrests otherwise than under such warrants. There can be no manner of doubt that arrests without warrants issued by a Court call for greater protection than do arrests under such warrants. The provision in Art. 22 that the arrested person should within 24 hours be produced before the nearest Magistrate is particularly desirable in the case of arrest otherwise than under a warrant issued by the Court, for it ensures the immediate application of a judicial mind to the legal authority of the person making the arrest and the regularity of the procedure adopted by him. In the case of arrest under a warrant issued by a Court, the judicial mind had already been applied to the case when the warrant was issued and, therefore, there is less reason for making such production in that case a matter of a substantive fundamental right. The requirement of Art. 22 (1) that no person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest indicates that the clause really contemplated an arrest without a warrant of Court, for, a person arrested under a Court's warrant is made acquainted with the grounds of his arrest before the arrest is actually effected. There can be no doubt that the right to consult a legal practitioner of his choice is to enable the arrested person to be advised about the legality or sufficiency of the grounds for his arrest. The right of the arrested person to be defended by a legal practitioner of his choice postulates that there is an accusation against him against which he has to be defended. The language of Art. 22 (1) and (2) indicates that the fundamental right conferred by it gives protection against such arrests as are effected otherwise than under a warrant issued by a Court on the allegation or accusation that the arrested person has, or is suspected to have, committed, or is about or likely to commit an act of a criminal or quasi-criminal nature or some activity prejudicial to the public or the State interest. In other words, there is indication in the language of Art. 22 (1) and (2) that it was designed to give protection against the act of the executive or other non-judicial authority. Whatever else may come within the purview of Art. 22 (1) and (2), the physical

Abducted Persons (Recovery and Restoration) Act (LXV of 1949)

restraint put upon an abducted person under S. 4 of Act 65 of 1949 in the process of recovering and taking that person into custody without any allegation or accusation of any actual or suspected or apprehended commission by that person of any offence of a criminal or quasi-criminal nature or of any act prejudicial to the State or the public interest, and delivery of that person to the custody of the officer in charge of the nearest camp under S. 4 of the Act cannot be regarded as arrest and detention within the meaning of Art. 22 (1) and (2). Consequently, S. 4 does not violate Art. 22 and is not, therefore, *ultra vires* : A. I. R. 1952 Punjab 309 REVERSED. *State of Punjab* v. *Ajaib Singh* A I R 1953 S C 10 =1953 S C R 254=1952 S C J 664.

(3) *S. 6 — Tribunal held not properly constituted.*

Tribunal constituted under S. 6 to decide the question of restoration of the abducted woman, was held not to be properly constituted and its decision was, therefore, without jurisdiction. *State of Punjab* v. *Ajaib Singh*, A I R 1953 S C 10 (12 & 16) (Supra).

ACCESSION

See 1951 S. C. R. 474 under Constitution of India, Arts. 363 & 374.

ACKNOWLEGMENT

See Limitation Act, S. 19 and Art. 64.

ACQUITTAL

See also (1) Criminal P. C., S. 417.
(2) Criminal trial.
(3) Constitution of India, Arts. 134 and 136.

(4) *Acquittal—Appeal from — Duty of Court.*

The High Court in hearing an appeal against an order of acquittal has full powers to review and reassess the evidence on the record and reach its own conclusions upon its estimate of the evidence. But, in exercising these powers the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Court as to the credibility of witnesses; (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at the trial; (3) the right

Acquittal

of the accused to the benefit of any doubt; and (4) the slowness of the appellate Court in disturbing the finding of fact arrived at by a judge who had the advantage of seeing the witnesses. *Held*, that the Judges of the High Court in disposing of appeal against acquittal and in convicting the accused did not keep these rules and principles of administration of criminal justice clearly before them and that their judgment was vitiated by non-advertence to and misappreciation of various material facts transpiring in evidence and the consequent failure to give due weight and consideration to the findings upon which the trial Court based its decision. *Madan Mohan Singh* v. *State of Uttar Pradesh*,

A I R 1954 S C 637 (641).

(5) *Acquittal—Appeal from—Oral evidence—Estimate of.*

While no doubt on an appeal against acquittal the High Court is entitled to go into the facts and arrive at its own estimate of the evidence, it is also settled law that, where the case turns an oral evidence of witness, the estimate of such evidence by the trial Court is not to be lightly set aside. General suspicions are not by themselves enough in an appeal against acquittal to dispute the credibility of witnesses, whom a trial Magistrate was inclined to accept. *S. A. A. Biyabani* v. *The State of Madras*

A I R 1954 S C 645 (647).

See also Madan Mohan Singh v. *State of Uttar Pradesh*, A. I. R. 1954 S. C. 637 (641) and *Surajpaul* v. *The State*, A I R 1952 S. C. 52 (54).

(6) *Acquittal—Appeal from—Consideration.*

It is settled law that the presumption of the innocence of an accused person is reinforced by an order of acquittal and a heavy onus rests on the prosecution in an appeal from such an order to prove that the order is manifestly erroneous. Thus, where in an appeal against acquittal the High Court approached the case as if it was an appeal against conviction and took the view that the accused having given no explanation regarding his knowledge of the place from which the ornaments were taken out, it must be presumed that he must have kept the ornaments there and that the fact that the field did not belong to the accused and that the place was accessible to others would not show that the ornaments were

Acquittal

not in his possession but were kept by someone else : *Held*, that it was not the correct way of approaching the decision of a case under S. 411, I. P. C. when the field from which the ornaments were recovered was an open one, and accessible to all and sundry, it is difficult to hold positively that the accused was in possession of these articles. The fact of recovery by the accused is compatible with the circumstances of somebody else having placed the articles there and of the accused somehow acquiring knowledge about their whereabouts and that being so, the fact of discovery cannot be regarded as conclusive proof that the accused was in possession of these articles. *Trimbak* v. *The State of Madhya Pradesh*

A I R 1954 S C 39 (40).

(7) *Acquittal—Appeal against—Powers of High Court in.*

It is not correct to say that the High Court has no power under S. 417, Criminal P. C. to reverse a judgment of acquittal unless the judgment is perverse or the subordinate Court has in some way or other misdirected itself so as to produce a miscarriage of justice. Sections 417, 418 and 423 of the Code give to the High Court full power to review at large the evidence upon which the order of acquittal was founded, and to reach the conclusion that upon evidence the order of acquittal should be reversed. No limitation should be placed upon that power, unless it be found expressly stated in the Code. But in exercising the power conferred by the Code and before reaching its conclusions upon fact, the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses, (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial, (3) the right of the accused to the benefit of any doubt and (4) the slowness of an appellate Court disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses. *Prandas* v. *The State*

A I R 1954 S C 36 (38).

(8) *Acquittal—Appeal against—Powers of appellate Court.*

In an appeal against an order of acquittal on a charge of murder, under S. 417, Criminal P. C., while the appeal Court has full

Acquittal

powers to review the whole case, the Court must start with the realisation that an experienced judicial officer (with four assessors) had concluded that there was clearly reasonable doubt in respect of the guilt of the accused on the evidence put before the Court. It, therefore, requires good and sufficiently cogent reasons to overcome such reasonable doubt before the appeal Court comes to a different conclusion. *Tulsiram Kanu* v. *The State*

A I R 1954 S C 1 (2)
=1953 S C J 612.

(9) *Acquittal—Appeal against—Duty of High Court.*

In an appeal against acquittal the High Court must not overlook the well-known principles recognised in the administration of criminal justice as laid down by the Privy Council in A. I. R. 1934 P. C. 227 (2) that the order of acquittal had strengthened the presumption of innocence in favour of the appellant and that he was entitled to the benefit of reasonable doubt must not be lost sight of. *Zwinglee Ariel* v. *The State of Madhya Pradesh*

A I R 1954 S C 15 (18).

(10) *Acquittal—Order of, by High Court — Exercise of extra-ordinary jurisdiction by Supreme Court under Art. 136, Constitution of India.*

The exercise of the extraordinary jurisdiction vested in the Supreme Court by Art. 136 is not justifiable in criminal cases unless exceptional or special circumstances are shown to exist or that substantial and grave injustice has been done. In the case of an order of acquittal where the presumption of the innocence of an accused person is reinforced by an order of acquittal of a High Court, the exercise of this jurisdiction will not be justified for merely correcting errors of fact or law of the High Court. An occasion for interference with an acquittal order may arise, however, where a High Court acts perversely or, otherwise improperly or has been deceived by fraud. *The State Government, Madhya Pradesh* v. *Ramkrishna Ganpatrao Limsey*

A I R 1954 S C 20 (22).

(11) *Acquittal—Order of, by High Court, when reversing order of conviction—Overriding power of Supreme Court under Art. 136.*

Article 134 does not provide for an appeal from a judgment, final order or sentence in

Acquittal

a criminal proceeding of a High Court, if the High Court has on appeal reversed an order of conviction of an accused person and has ordered his acquittal. In other words, there is no provision in the Constitution corresponding to S. 417, Criminal P. C. and such an order is final, subject, however to the overriding powers vested in the Supreme Court by Art. 136 of the Constitution. *The State Government, Madhya Pradesh* v. *Ramkrishna Ganpatrao Limsey*

A I R 1954 S C 20 (22).

ADMINISTRATION OF EVACUEE PROPERTY ACT (XXXI OF 1950)

(12) *S. 1—Object and scheme of Act.*

The object and the scheme of the Act leave little doubt that the Act is intended, as its title shows, to provide for the administration of evacuee property and that this property has ultimately to be used for compensating the refugees who had lost their property in Pakistan. The Act contains elaborate provisions as to how the administration is to be carried out. *Ebrahim Aboobaker* v. *Tek Chand Dolwani*

A I R 1953 S C 298 (303) =1953 S C R 691=1953 S C J 411.

(13) *Ss. 2 (a) 12 (1) and rules under S. 56 (2) (h), R. 14 — Cancellation of allotment by Deputy Custodian, valid—(East Punjab Evacuees' (Administration of Property) Act (14 of 1947), Ss. 9A (2), 22 (2) (ff).*

The Deputy Custodian had the jurisdiction to cancel allotment both under the State and the Central Acts. Sub-r. (4) of R. 14 requires the Custodian before passing any other order of cancellation or variation of the terms of a lease, to serve the person or persons concerned with a notice to show cause against the order proposed to be made and to afford him a reasonable opportunity of being heard, but no notice is provided for cancellation of an allotment under the rules. The obvious answer to this differentiation appears to be that a lease is granted for a definite period and it is only fair to give the lessee a notice before his lease is terminated before the expiry of the stipulated period, whereas the allottee of land under the quasi permanent settlement stands on a different footing. Even if the order of cancellation was passed during the operation of a stay order, the order of cancellation cannot be challenged on that ground. The Central Government enunciated a certain policy on the subject of amending sub-r. 6 of R. 14 pending the advice of the law Ministry, but apparently the policy was not given effect to and no rule was framed in pursuance of the decision. It is clear, therefore, that the Central Government merely issued interim instructions pending the amendments of the rule but no rule was framed to give effect to those instructions which in consequence did not acquire any statutory force. Mere stay of implementation of the orders contained in the statement of policy did not wipe out the effect of the cancellation. The old orders of cancellation stood such as orders based on grounds other than undeserved or excessive allotments. Once the order of cancellation was passed by the Deputy Custodian, the petitioners lost their right to possession and even if the letter of the 14th May 1953, of the Ministry of Rehabilitation is treated as a direction by the Central Government under S. 54, it cannot have the effect of restoring what had been lost. *Dunichand Hakim* v. *Deputy Commr. (Deputy Custodian, Evacuee Property) Karnal,*

AIR 1954 S C 150 (152, 153) =1954 S C R 578=1954 S C J 213.

(14) *S. 2 (f) (1)—'Any mode of transfer.'*

Section 2 (f) (1) does not apply to the case of the persons who do not claim the property from the evacuee after the 14th day of August 1947 by any mode of transfer but by right of succession under the Muhammadan law. Succession to property implies devolution by operation of law and cannot appropriately be described as a mode of transfer which obviovsly contemplates a transfer *inter vivos. Ebrahim Aboobakar* v. *Tek Chand Dolwani,*

AIR 1953 S C 298 (300, 301) =1953 S C R 691=1953 S C J 411.

(15) *Ss. 2 (f), 7 & 8—Scope of—Person and not property is aimed at.*

The argument that the Act aims at fixing the nature of the property from particular date and that the proceedings taken are against the property and not against the person is fallacious. There can be no property evacuee or otherwise unless there is a person who owns that property. The pro-

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perty cannot be notified as evacuee property unless and until the person claiming interest in it has been given notice. *Ebrahim Aboobakar* v. *Tek Chand Dolwani*,

AIR 1953 S C 298 (302, 303) (Supra).

(16) *Ss. 7 & 8—Death of alleged evacuee before declaration.*

Reading Ss. 7 and 8 together with, it appears that the Custodian gets dominion over the property only after the declaration is made. The declaration follows upon the inquiry made under S. 7 but until the proceeding is taken under S. 7, there can be no vesting of the property and consequently no right in the Custodian to take possession of it. Where, therefore, the alleged evacuee dies before the declaration, the Custodian cannot take possession after the death of the alleged evacuee when the property had passed into the hands of the heirs. The inquiry under S. 7 is a condition precedent to the making of a declaration under S. 8 and the right of the Custodian to exercise dominion over the property does not arise until the declaration is made. Hence the heirs cannot be deprived of their property before the Custodian obtains dominion. *Ebrahim Aboobakar* v. *Tek Chand Dolwani*,

AIR 1953 S C 298 (302) (Supra).

(17) *Ss. 7 and 24 — Order refusing to declare a person as evacuee—Order is one under S. 7 and is appealable under S. 24.*

Section 24 confers a right of appeal againt all orders made under S. 7 and does not specify the nature of the orders made appealable. In an enquiry under S. 7 the first point for adjudication is whether a certain person falls within the definition of the word "evacuee" given in the Act. If he comes within the ambit of the definition, then any property held by him becomes evacuee property. The decision of the Custodian whether in the affirmative or in the negative amounts to an adjudication under S. 7 and is as such appealable.

The contention that when the Custodian reaches the conclusion that a certain person is not an evacuee, then he is not entitled to make any order whatsoever but has just to file the proceedings is unsound. When a certain person claiming to be interested in getting a property declared evacuee property is allowed to put in a written statement and lead evidence, then the decision of the Court whether favourable or un-

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favourable to him has to take the form of an adjudication and necessarily amounts to an order. The power of granting a certain relief includes obviously the power of refusing that relief. Hence an order made by the Additional Custodian refusing to declare a person an evacuee and his property evacuee property is an order made under S. 7 and is, therefore, appealable under S. 24 : A I R 1950 F C 140, *Ref.*, *Ebrahim Aboobakar* v. *Custodian General*,

AIR 1952 S C 319 (324) =1952 S C R 696 =1952 S C J 583.

(18) *Ss. 7 & 45—Proceedings cannot be continued against heirs of the deceased.*

Section 141, Civil P. C., does not apply as the Custodian is not a Court, though the proceedings held by him are of a quasi-judicial nature. S. 45 of the Act applies the provisions of the Code only in respect of enforcing the attendance of any person and examining him on oath, and compelling the discovery and production of documents. The provisions of the Code relating to substitution are, therefore, inapplicable and there is no other provision in the Act for the heirs to be substituted in place of the deceased so as to continue proceedings against them. If the proceedings cannot be continued against the heirs upon the death of the alleged evacuee, it is logical to hold that they cannot be initiated against them. Hence the proceedings must lapse upon the death of such person. *Ebrahim Aboobakar* v. *Tek Chand Dolwani*,

A I R 1953 S C 298 (302) =1953 S C R 691=1953 S C J 411.

(19) *S. 8 — Vesting contemplated by the section.*

After a man is dead, his property cannot be declared evacuee. There is no provision in the Act that after a man is dead, his property can be declared an evacuee property. *Ebrahim Abootakar* v. *Tek Chand Dolwani*,

A I R 1953 S C 298 (302) (Supra).

(20) *S. 24—"Person aggrieved"—Administration of Evacuee Property (Central) Rules (1950), R. 5 (5).*

Where upon the first information by a person that a certain property is evacuee property, the Custodian starts an inquiry into the truth and validity of the informa-

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tion under R. 5 of the Rules framed under the Ordinance (now Act) and the first informant puts in a reply to the written statement of the owner of the property and also adduces evidence in support of his information and the Custodian ultimately decides that the property is not an evacuee property, then such a person, who as the first informant is entitled to first consideration in the matter of allotment of the property, is certainly a 'person aggrieved' within the meaning of S. 24 of the Ordinance (now Act). When a person is given a right to raise a contest in a certain matter and his contention is negatived then he is certainly a person aggrieved by the order disallowing his contention : (1894) 2 Q B D 805, *Rel. on. Ebrahim Abootakar* v. *Custodian General*,

AIR 1952 S C 319=1952 S C R 696 =1952 S C J 583.

(21) *S. 24—Certiorari—Writ of—Conditions for issue of — Mere wrong decision no ground — Constitution of India, Art. 226.*

A writ of certiorari cannot be granted to quash the decision of an inferior Court within its jurisdiction on the ground that the decision is wrong. It must be shown before such a writ is issued that the authority which passed the order acted without jurisdiction or in excess of it or in violation of the principles of natural justice. Once it is held that the Court has jurisdiction but while exercising it, it made a mistake, the wronged party can only take the course prescribed by law for setting matters right inasmuch as Court has jurisdiction to decide rightly as well as wrongly.

The Custodian General has been constituted an appellate Court under S. 24 of the Administration of Evacuee Property Act in words of the widest amplitude and the Legislature has not limited his jurisdiction by providing that such exercise will depend on the existence of any particular state of facts. Ordinarily, a Court of appeal has inherent jurisdiction to determine any point raised before it in the nature of preliminary issues by the parties. Thus, whether an appeal is competent, whether a party has 'locus standi' to prefer it, whether the appeal in substance is from one or another order and whether it has been preferred in proper form and within the time prescribed,

Administration of Evacuee Property Act (XXXI of 1950)

are all matters for the decision of the appellate Court so constituted. Even if it decides these questions wrongly, a writ cannot be issued against it for quashing the order. *Ebrahim Aboobakar* v. *Custodian General of Evacuee Property*,

AIR 1952 S C 319 (322) (Supra).

(22) *S. 40 — Scope of transfer inter vivos—Devolution of property on death—(Mohammadan Law.)*

Section 40 prohibits transfer *inter vivos* but cannot affect devolution by operation of law such as, on death. The estate of a deceased Mohammadan devolves on his heirs in specific shares at the moment of his death, and the devolution is neither suspended by reason of debts due from the deceased, nor is the distribution of the shares inherited postponed till the payment of the debts. Further property vests in the heirs under the Mohammadan law, unlike the Indian Succession Act, without the intervention of an administrator. *Ebrahim Aboobakar* v. *Tek Chand Dolwani*,

A I R 1953 S C 298 (302) =1953 S C R 691=1953 S C J 411.

(23) *S. 45 (c)—Applicability of O. 22, R. 6, Civil P. C. to proceedings under Administration of Evacuee Property Ordinance (1949).*

The principle of O. 22, R. 6, Civil P. C. is applicable to proceedings under the Administration of the Evacuee Property Ordinance. Thus, an order written out and signed by the Custodian General prior to the death of the party affected but pronounced after the death of the party is not invalid on the principle of O. 22, R. 6, *Ebrahim Aboobakar* v. *Custodian General*.

A I R 1952 S C 319 (Supra).

ADVERSE POSSESSION

See also 1951 S C R 431 under 'Fisheries'

(24)— *Adverse possession — Mere non-payment of rent for a long time—Not enough for.*

Where it was found that the defendants and their predecessors-in-title had been in possession of the lands in suit without payment of rent for a considerable but an unascertained period of time, and there was no proof that the defendants set up any adverse title prior to 1931, much less than the plaintiff had knowledge of the same : Held, that non-payment of rent in

itself was not sufficient to make possession of the defendants adverse, and that it was only in 1931 that the defendants could be said clearly to have asserted a hostile title, and that therefore the suit brought within 12 years from that date was within time. *Manohar Das* v. *Charu Chandra*

A I R 1955 S C 228 (232).

(25)—*Adverse possession — Acquisition of, in fisheries.*

Fishermen of particular village allowed to fish in certain rivers flowing through a Zamindari for several years by the Zamindar: Held, no right to fish acquired by the fisherman either by adverse possession or by prescription. *Raja Braja Sundr Deb* v. *Moni Behara*

AIR 1951 S C 247=1951 S C R 431 =1951 S C J 363.

(26)—*Adverse possession — Co-sharers— Limitation Act, Art. 144.*

No question of adverse possession arises where the possession is held under an arrangement between the co-sharers. *Chhote Khan* v. *Mal Khan*

AIR 1954 S C 575 (579).

(27)—*Adverse possession—Shebaits' possession not adverse to idol — Limitation Act (1908), Art. 144.*

If a shebait by acting contrary to the terms of the appointment or in breach of his duty as such shebait could claim adverse possession of the dedicated property against the idol it would be putting a premium on dishonesty and breach of duty on his part and no property which is dedicated to an idol would ever be safe. The shebait for the time being is the only person competent to safeguard the interests of the idol, his possession of the dedicated property is the possession of the idol whose sebait he is, and no dealing of his with the property dedicated to the idol could afford the basis of a claim by him for adverse possession against the idol. *Sree Sree Ishwar Sridhar Jew* v. *Mst. Sushila Bala Dasi*

AIR 1954 S C 69 =1954 S C J 17.

(28) *Adverse possession against female shebait—Limitation Act, Arts. 124 & 141.*

Alienation of shebaiti right by female heir — Suit for possession of shebaitship by reversioners on death of female shebait governed by Art. 124 and not by Art. 141 of the Limitation Act — Reading Art. 124 along with S. 2 (8), the conclusion is irresistible that to defeat the title of the plaintiff

under Art. 124 it is necessary to establish that the defendant had taken possession of the office adversely to the plaintiff or somebody from or through whom the plaintiff derives his title more than 12 years prior to the institution of the suit—Limitation runs only from the date of widow's death and not from the date of alienation : 23 Mad. 271 P. C., *Expl. & applied. Kalapada Chakraburti* v. *Palani Bala Devi*

AIR 1953 S C 125=1953 S C R 503 =1953 S C J 208.

ADVOCATE

See also Supreme Court Advocate (Practice in High Courts) Act, 1951.

(29) *Advocate enrolled in Supreme Court — Rights of — Advocate of Calcutta or Bombay High Court entitled only to plead on original side — Whether by enrolled as an Advocate of Supreme Court, entitled also to act on that side—Meaning of "entitled to practise as of right."*

Held, (Per *Majority*: *Mukherjea and Das JJ., Contra)* — An Advocate of the Supreme Court becomes entitled as of right to appear and plead as well as to act in all the High Courts including the High Court in which he is already enrolled, without any differentiation being made for this purpose between the various jurisdictions exercised by those Courts. The word "practise" as applied to an Advocate in India includes both the functions of acting and pleading, and there is nothing in S. 2 to warrant the cutting down of that statutory right to pleading only on the Original Side of the Calcutta High Court. It cannot be held that because the Advocates of the Supreme Court are not under the Rules of that Court, entitled to act, the word 'practise' as used by Parliament in S. 2 must be understood in the restricted sense of appearing and pleading only. Such Rules are liable to be altered at any time in exercise of the rule-making power conferred by Art. 145 of the Constitution. The Legislature used the word 'practise' both in the Bar Councils Act and in the Supreme Court Advocate (Practice in High Courts) Act in its full sense of acting and pleading, but while in the case of Advocates of the Calcutta and Bombay High Courts it has expressly preserved and continued the power of those Courts to restrict or exclude the right of practice on the Original Side, it has reserved no such overriding power under the Act of 1951,

Advocate

with the result that any restrictive rule cutting down the statutory right would be repugnant to S. 2 and therefore void and inoperative. In the absence of such reservation, the statutory right of a Supreme Court Advocate to plead as well to act in the High Courts of Calcutta and Bombay in the exercise of their Original Jurisdiction cannot be taken away or curtailed by those Courts, and any rules which they may have made in the past purporting to exclude any Advocate from acting on their Original Side or from appearing and pleading unless he is instructed by an attorney cannot affect such right. *Aswini Kumar Ghose* v. *Arabinda Bose*

A I R 1952 S C 369 (373, 374, 375) =1953 S C R 1=1952 S C J 568.

AFFIDAVIT

See C. P. C. Order 19, R. 3.

AGENT

See Contract Act.

AGRICULTURIST RELIEF

See Madras Agriculturists Relief Act.

AJMER GOVERNMENT WARDS REGULATION (1 of 1888)

(30) *Ss. 6 & 27 — Ajmer Tenancy and Land Records Act (42 of 1950), S. 112 — Jurisdiction of Civil Court.*

The result of the combined operation of S. 112 of Act 42 of 1950 and of the provisions of Regulation 1 of 1888 is that the Court of Wards can in its own discretion and on its subjective determination, assume the superintendence of the property of a landlord who habitually infringes the rights of his tenants. The exercise of this discretion cannot be questioned in any manner in a Civil Court. *Raghubir Singh* v. *Court of Wards, Ajmer*

A I R 1953 S C 373 (374) =1953 S C R 1049=1953 S C J 505.

AJMER EXCISE REGULATION, 1915

See Constitution of India, Art. 19 (1) (g).

AJMER LAWS REGULATION (3 of 1877)

(31) *S. 40 — Rules under—R. 1 — Validity—Sub-rr. (1) to (4) of R. 1 are invalid —Constitution of India, Art. 19 (1) (g).*

The Regulation empowers the Chief Commissioner to make rules for the establishment of a system of conservancy and sanitation at fairs and large public assemblies. He can only do this by bringing a system into existence and incorporating it in his rules so that all concerned can know what the system is and make arrangements to comply with it. The Rules in question, however, in effect, empower the District Magistrate to make his own system and see that it is observed. As the Regulation confers this power on the Chief Commissioner and not on the District Magistrate, the action of the Chief Commissioner in question delegating this authority to the District Magistrate is *ultra vires.*

Further under the fourth sub-rule of R. 1 the District Magistrate is empowered to revoke a permit granted "without assigning any reasons or giving any previous notice." This absolute and arbitrary power uncontrolled by any discretion is also *ultra vires.* The Regulation assumes the right of persons to hold fairs, and all it requires is that those who do so should have due regard for the requirements of conservancy and sanitation. If they are in a position to observe these rules, they are, so far as the Regulation is concerned, entitled to hold their fair, for there is no other law restricting that right. Therefore, the Chief Commissioner cannot by rule invest the District Magistrate, with the right arbitrarily to prohibit that which the law and the Constitution, not only allow, but guarantee.

Held that as these sub-rules were *ultra vires*, the District Magistrate's order which in effect, prohibited the holding of the fair was also bad. *Ganpati Singhji* v. *State of Ajmer* **A I R 1955 S C 188.**

AJMER-MERWARA (EXTENSION OF LAWS) ACT, 1947

(32) *S. 2 — Validity of Part C State Laws Act (XXX of 1950), S. 2—(Delhi Laws Act, 1912, S. 7) — Power to apply existing legislation to specified areas conferred on subordinate authority — Power including power to restrict, amend and repeal—Validity—Principles of delegated legislation exhaustively discussed.*

Held, (Per *Fazal Ali, Shastri, Mukherjea, Das and Bose JJ., Kania C. J. and Mahajan J., Contra.)* — S. 7 of the Delhi Laws Act, 1912 was valid and no part thereof was '*ultra vires*' the legislature that passed it. The Ajmer-Merwara (Extension of Laws) Act, 1947 was valid

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and no part thereof was *ultra vires* the Legislature that passed it.

Per *Fazl Ali, Sastri and Das JJ.* — S. 2 of the Part C States (Laws) Act 1950, is valid and no part thereof is '*ultra vires*' the Parliament.

Per *Mukherjea and Bose JJ.* — S. 2 of the Part C States (Laws) Act, 1950 is *intra vires* except for the concluding sentence which runs as follows : 'any provision may be made in any enactment so extended for the repeal or amendment of any corresponding law (other than a Central Act) which is for the time being applicable to that Part C States.' This portion is '*ultra vires*' but as it can be separated from the rest of the Act, the remainder is good.

Per *Bose J.*—'My answers are, however, subject to this qualification. The power to 'restrict' and modify' does not import the power to make essential changes. It is confined to alternations of a minor character such as are necessary to make an Act intended for one area applicable to another and to bring it into harmony with laws already in being in the State, or to delete portions which are meant solely for another area."

Per *Kania C. J. and Mahajan J.* — S. 7, Delhi Laws Act, 1912, S. 2—Ajmer-Merwara (Extension of Laws) Act, 1947 and S. 2, Part C States (Laws) Act 1950 are '*ultra vires*' the Legislature, functioning at the relevant dates, to the extent power is given to the Government (Executive) to extend Acts other than Acts of the Central Legislature. By enacting S. 7, Delhi Laws Act the legislature virtually abdicated its legislative power in favour of the executive. That was not warranted by the Indian Councils Act, 1861 or by any decision of the Privy Council or on the basis of any legislative practice. The section, therefore, is *ultra vires* the Indian Councils Act, 1861 in the following particulars (i) inasmuch as it permits the executive to apply to Delhi Laws enacted by legislatures not competent to make laws for Delhi and which these legislatures may make within their own legislative field and (ii) inasmuch as it clothes the executive with co-extensive legislative authority in the matter of modification of laws made by legislative bodies in India. S. 2, Ajmer-Merwara (Extension of Laws) Act, 1947 and S. 2, Part C States

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(Laws) Act 1950 are also *ultra vires* the Government of India Act, 1935 and the Constitution of India respectively in the two particulars stated above.

Per *Fazl Ali J.*—The power of introducting necessary restrictions and modifications in the provisions in question is incidental to the power to apply or adapt the law. The modifications are to be made within the framework of the Act and they cannot be such as to affect its identity or structure of the essential purpose to be served by it. The power to modify certainly involves a discretion to make suitable changes, but it would be useless to give an authority the power to adapt a law without giving it the power to make suitable changes. The discretion given to modify a statute is by no means absolute or irrevocable in strict legal sense.

Per *Mukherjea J.*— The word 'restriction' connotes limitation imposed upon a particular provision so as to restrain its application or limit its scope. It does not by any means involve any change in the principle. In the context and used along with the word 'restriction' the word 'modification' has been employed also in the cognate sense and it does not involve any material or substantial alteration. The word 'modification' in S. 7 of the Delhi Laws Act means and signifies changes of such character as are necessary to make the statute which is sought to be extended suitable to the local conditions of the Province. The executive government is not entitled to change the whole nature or policy underlying any particular Act or take different portions from different statutes and prepare an 'amalgam' of several laws.

[Question whether legislative powers may be delegated at all and if so, to what extent it may be done, exhaustively discussed by all the Judges as follows :]

Per *Fazl Ali J.* — (1) The legislature must normally discharge its primary legislative function itself and not through others. (2) Once it is established that it has sovereign powers within a certain sphere, it must follow as a corollary that it is free to legislate within that sphere in any way which appears to it to be the best way to give effect to its intention and policy in making a particular law, and it may utilize

any outside agency to any extent it finds necessary for doing things which it is unable to do itself or finds it inconvenient to do. In other words, it can do everything which is ancillary to and necessary for the full and effective exercise of its power of legislation. (3) It cannot abdicate its legislative functions, and therefore while entrusting power to an outside agency, it must see that such agency acts as a subordinate authority and does not become a parallel legislature. (4) The doctrine of separation of powers and the judicial interpretation, it has received in America ever since the American Constitution was framed, enables the American Courts to check undue and successive delegation but the Courts of this country are not committed to that doctrine and cannot apply it in the same way as it has been applied in America. Therefore, there are only two main checks in this country on the power of the legislature to delegate, these being its good sense and the principle that it should not cross the line beyond which delegation amounts to 'abdication and self effacement'. Delegated legislation using the expression in the popular sense has become present-day necessity, and it has come to stay—it is both inevitable and indispensable. The legislature has now to make so many laws that it has no time to devote to all the legislative details and sometimes the subject on which it has to legislate is of such a technical nature that all it can do is to state the broad principles and leave the details to be worked out by those who are more familiar with the subject. Again when complex schemes of reform are to be the subject of legislation, it is difficult to bring out a self contained and complete Act straightway, since it is not possible to foresee all the contingencies and envisage all the local requirements for which provision is to be made. Thus, some degree of flexibility becomes necessary, so as to permit constant adaptation to unknown future conditions without the necessity of having to amend the law again and again. The advantage of such a course is that it enables the delegated authority to consult interests likely to be affected by a particular law, make actual experiments when necessary, and utilize the results of its investigations and experiments in the best way possible.

There may also arise emergencies and urgent situations requiring prompt action and the entrustment of large powers to authorities who have to deal with the various situations as they arise.

The complexity of modern administration and the expansion of the functions of the State to the economic and social sphere have rendered it necessary to resort to new forms of legislation and to give wide powers to various authorities on suitable occasions. But while emphasizing that delegation is in these days inevitable, one should not omit to refer to the dangers attendant upon the injudicious exercise of the power of delegation by the legislature. The dangers involved in defining the delegated power so loosely that the area it is intended to cover cannot be clearly ascertained and in giving wide delegated powers to executive authority and at the same time depriving a citizen of protection by the Courts against harsh and unreasonable exercise of powers, are too obvious to require elaborate discussion.

Per *Mukherjea J.*—The Legislature cannot part with its essential legislative function which consists in declaring its policy and making it a binding rule of conduct. A surrender of this essential function would amount to abdication of legislative powers in the eye of law. The policy may be particularised in as few or as many words as the legislature thinks proper, and it is enough if an intelligent guidance is given to the subordinate authority. The Court can interfere if no policy is discernible at all or the delegation is of such an indefinite character as to amount to abdication, but as the discretion vests with the Legislature in determining whether there is necessity for delegation or not, the exercise of such discretion is not to be disturbed by the Court except in clear cases of abuse. Th eseare the fundamental principles and in respect to the powers of the Legislature the constitutional position in India approximates more to the American than to the English pattern. There is a basic difference between the Indian and the British Parliament in this respect. There is no constitutional limitation to restrain. There is no constitutional limitation to restrain the British Parliament from assigning its powers where it will but the Indian Parliament qua legislative body

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is fettered by a written Constitution and it does not possess the sovereign powers of the British Parliament. The limits of the powers of delegation in India would therefore have to be ascertained as a matter of construction from the provisions of the Constitution itself and the right of delegation may be implied in the exercise of legislative power only to the extent that it is necessary to make the exercise of the power effective and complete.

Per *Bose J.* — The concept of legislative power which had hitherto been accepted in India continued to hold good but that this limitation was placed upon it by the Constitution namely that wherever the Constitution empowers Parliament to do a particular thing as opposed to legislating generally on a particular topic, there can be no delegation, Parliament must itself act. It has been held from the earliest times, even when viewed through purely British eyes, that a Legislature created by the British Parliament (1) cannot act beyond the ambit of its powers the extent of which must be gathered from the document which brings it into being, (2) it cannot create a new Legislature for the purpose of legislating generally and (3) it cannot abdicate. The same limitations exist in the case of the Indian Parliament because that, unlike the British Parliament, is not free to do as it likes; it is bound by the Constitution.

Per *Kania C. J.*—While a Legislature, as a part of its legislative functions, can confer powers to make rules and regulations for carrying the enactment into operation and effect, and while a Legislature has power to lay down the policy and principles providing the rule of conduct, and while it may further provide that on certain data or facts being found and ascertained by an executive authority, the operation of the Act can be extended to certain areas or may be brought into force on such determination which is described as conditional legislation, the power to delegate legislative functions generally is not warranted under the Constitution of India at any stage. Therefore the contention that legislative power carries with a general power to delegate legislative functions, so that the Legislature may not define its policy at all and may lay down no rule, of conduct but that whole thing may be left either to the executive authority or administrative or other body, is unsound. The true

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test in respect of 'abdication' or effacement appears to be whether in conferring the power to the delegate, the Legislature, in the words used to confer the power, retained its control. Does the decision of the delegate derive sanction from the act of the delegate or has it got the sanction from what the Legislature has enacted and decided ? To say that the true test of effacement is that the authority which confers power on the subordinate body should not be able to withdraw the power appears to be meaningless. Abdication by a legislative body need not necessarily amount to a complete effacement of it. Abdication may be partial or complete. When in respect of a subject in the Legislative List the Legislature says that it shall not legislate on that subject but would leave it to somebody else to legislate on it, why does it not amount to abdication or effacement ? If full powers to do anything and everything which the Legislature can do are conferred on the subordinate authority, although the Legislature has power to control the action of the subordinate authority, by recalling such power or repealing the Acts passed by the subordinate authority, the power conferred by the instrument amounts to an abdication or effacement of the Legislature conferring such power. The power of delegation, in the sense of the Legislature conferring power, on either the executive government or another authority, to lay down the policy underlying a rule of conduct is not permitted. *In re Art. 143, Constitution of India, etc.*

A I R 1951 S C 332
=1951 S C R 747=1951 S C J 527.

ALIBI

See also Criminal Trial.

(33)—*Alibi — Plea of — Based on concurrent findings — Practice of Supreme Court—Constitution of India, Art. 134.*

The plea of alibi involves a question of fact and when both the Courts below concurrently found that fact against the accused, the Supreme Court cannot, on an appeal by special leave, go behind that concurrent finding of fact. *Thakur Prasad* v. *The State of Madhya Pradesh,*

A I R 1954 S C 30 (31).

(34)—*Alibi — Finding as to, by Courts below—Practice of Supreme Court.*

Per *Fazl Ali, J.* — Ordinarily Supreme Court will not look beyond the findings of

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fact arrived at by the Courts below, but when the decision on the plea of alibi has been arrived at in disregard of the principle that the standard of proof which is required in regard to that plea must be the same as the standard which is applied to the prosecution evidence and in both cases it should be a reasonable standard, the Supreme Court may interfere. *Mohindar Singh* v. *The State* **1950 S C R 821 (830).**

APPEAL & APPELLATE COURT

See C. P. C., S. 96 & O. 41; Cr. P. C., Ss. 417 & 423; Constitution of India, Art. 134-138 & Practice.

ARBITRATION

(35)—*Arbitration clause—Construction of — Test, as to whether certain disputes were within the scope of the said clause.*

Where a party has to have recourse to the contract to establish his case, it is a dispute under the contract. Accordingly where a contract for the sale of jute, after providing for delivery of jute, non-delivery of documents, non-acceptance of documents, claims etc., further provided for granting of extension of time for delivery on certain conditions and contained an arbitration clause in the following terms:

"All matters, questions, disputes, differences and/or claims arising out of and/or concerning and/or in connection and/or in consequence of or relating to this contract . . . . . shall be referred to the arbitration of the Bengal Chamber of Commerce"

and the principal dispute between the parties was whether an extension of time for delivery was granted within the time allowed by the contract and there was also a further dispute (raised after the matter went to the arbitrators) that one of the parties to the contract was not a party in his own right as principal but that he entered into the contract only on behalf of a company as a broker and a question arose whether the disputes were covered by the arbitration clause: Held, that the principal dispute was covered by the arbitration clause. Even assuming that it was open to the party to raise the further objection after the matter went to the arbitrators, the further dispute was also one which turned upon the true interpretation of the contract so that the other party must have recourse to the contract to establish his claim that the former was not bound as principal while the latter

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say that he was. Such a dispute the determination of which turns on the true construction of the contract would also be a dispute under or arising out of or concerning the contract and so fell within the scope of the arbitration clause in the contract between the parties. *A. M. Mair & Co.* v. *Gordhandas Sagarmull*

AIR 1951 S C 9=1951 S C J 1.

ARBITRATION ACT (X of 1940)

(36) *S. 30 — Decision of arbitrators — Validity of—Principles.*

So long as the arbitrators act within the scope of their authority there can be no doubt that their decision must be accepted as valid and binding.

The agreement for reference to arbitration should be liberally construed by the Court so as to lean in favour of upholding the award given by arbitrators, but that is no ground for sustaining the award where the arbitrators have clearly misdirected themselves and have exceeded the scope of their authority.

Thus where the words in the agreement "Jo kuchh tai tasfiya faisalla karenge ham ko kabool-o-manzoor hoga" on a proper interpretation were obviously intended to mean that the arbitrators were to put an end to the dispute by deciding the question of liability once for all and the parties were to abide by their decision and they did not lead to the inference that the arbitrators were to travel outside the powers conferred upon them by the reference and were to decide the dispute on considerations wholly extraneous to it and where though both the respondents were found liable upon the bhai khata account the exact amount was not determined by the award and while a certain portion out of a larger sum found due was awarded against respondent 1, the liability of respondent 2 was remitted in toto :

Held that the arbitrators acted in excess of their authority and the award was therefore set aside. *Gobardhan Das* v. *Lachhmi Ram*,

AIR 1954 S C 689 (692).

(37) *S. 30 — Misconduct—Hearing one party in absence of other.*

One *P* died leaving him surviving his widow, his undivided brother, a son of his another pre-deceased brother and his son by his pre-deceased wife. The deceased had purported to make a will under which he had made certain provision for maintenance

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and residence of the widow. The widow filed a suit for maintenance, arrears of maintenance and residence. When the plaintiff was being examined as P. W. 1 in the suit all the parties filed a petition under S. 21 of the Arbitration Act agreeing to appoint *K* one as the 'sole arbitrator' for setting the disputes in the suit and to abide by his decision. The petition filed by the parties did not give any special powers to the arbitrator. The plaint, the written statement and the other records were agreed to be sent to him for his decision, and the arbitrator was directed to make his award after perusing the plaint and the written statement which were given to him by the Court along with the order. The arbitrator examined the defendant in the absence of the plaintiff and also perused the will without giving an opportunity to the plaintiff to have her say in the matter. The statement which was obtained from the defendant contained several statements of fact, which did not find a place in his written statement: Held, that the course of proceeding adopted by the arbitrator was obviously contrary to the principles of natural justice. The arbitrator was guilty of legal misconduct and that was sufficient to vitiate the award. *Payyavula Vengamma* v. *Payyavula Kesanna*

A I R 1953 S C 21 (23) =1952 S C J 630.

(38) *S. 31 (4) — "In any reference" —Meaning of.*

In the context of S. 31 (4), it is reasonable to think that the phrase 'in any reference' means 'in the matter of a reference.' The word 'reference' having been defined in the Act as 'reference to arbitration' the phrase 'in a reference' would mean 'in the matter of a reference to arbitration.' The phrase 'in a reference' is, therefore, comprehensive enough to cover also an application first made after the arbitration is completed and a final award is made. *Kumbha Mawji* v. *Dominion of India (Now the Union of India)*

A I R 1953 S C 313 (318) =1953 S C R 878 = 1953 S C J 436.

(39) *S. 14 (2)—Authority of umpire for filing award.*

Section 14 (2) clearly implies that where the award or a signed copy thereof is in fact filed into Court by a party he should have the authority of the umpire for doing so. Where the awards are handed over by the

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umpire to the party, it cannot be assumed that the mere handing over of the awards necessarily implies the authority of the umpire to file the same into Court on his behalf. That authority has to be specifically alleged and proved. In the absence of such authority, the filing of the awards by the party cannot be the filing by the umpire. *Kumbha Mawji* v. *Dominion of India (Now the Union of India)*

A I R 1953 S C 313 (315) (Supra).

(40) *S. 14 (2)—Filing of award.*

Under S. 14 (2) the actual filing by the umpire is not essential. It is sufficient if the umpire causes the award to be filed. Where in response to a notice issued to him by the Court, the umpire forwards to the Court the award by post, there is sufficient compliance with S. 14 (2). *Kumbha Mawji* v. *Dominion of India (Now the Union of India)*

A I R 1953 S C 313 (316) (Supra).

(41) *S. 34—Stay—Conditions necessary for granting of.*

In order that a stay may be granted under S. 34, it is necessary that the following conditions should be fulfilled: (1) The proceeding must have been commenced by a party to an arbitration agreement against any other party to the agreement : (2) the legal proceeding which is sought to be stayed must be in respect of a matter agreed to be referred : (3) the applicant for stay must be a party to the legal proceeding and he must have taken no step in the proceeding after appearance. It is also necessary that he should satisfy the Court not only that he is but also was at the commencement of the proceedings ready and willing to do every thing necessary for the proper conduct of the arbitration, and (4) the Court must be satisfied that there is no sufficient reason why the matter should not be referred to an arbitration in accordance with the arbitration agreement. *Anderson Wright Limited* v. *Moran & Co.*

A I R 1955 S C 53.

(42) *S. 34—Stay—Jurisdiction of Court — Question whether plaintiff was party to contract containing arbitration agreement.*

The first and essential pre-requisite to making an order of stay under S. 34 is that there is a binding arbitration agreement between the parties to the suit which is sought to be stayed. The question whether the dispute in the suit falls within the

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arbitration clause really pre-supposes that there is such agreement and involves consideration of two matters, viz., (1) what is the dispute in the suit and (2) what disputes the arbitration clause covers.

Where on an application made under S. 34 for stay of a suit, an issue is raised as to the formation, existence or validity of the contract containing the arbitration clause, Court is not bound to refuse a stay but may in its discretion, on the application for stay, decide the issue as to the existence or validity of the arbitration agreement even though it may involve incidentally a decision as to the validity or existence of the parent contract. Thus, where the question raised by the plaintiff in the suit is that the contract containing the arbitration agreement was really between the defendant and another party and not between him and the defendant and consequently he was not bound by the contract and the defendant files an application under S. 34 for stay of the suit, the Court has undoubted jurisdiction to decide the question for the purpose of finding as to whether or not there is a binding arbitration agreement between the parties to suit. If the person, whose concern with the agreement is in question, is a signatory to the contract and formally a contracting party, that will be sufficient to enable the Court to hold for purposes of S. 34 that he is a party to the agreement. *Anderson Wright Limited* v. *Moran & Company*,

A I R 1955 S C 53.

(43) *S. 34—Stay—Jurisdiction of Court—Court should be satisfied of grounds.*

The only point which the Court exercising jurisdiction under the section can decide is whether the claim brought in the suit sought to be stayed comes within the submission to arbitration. The Court cannot go into the validity of that claim in the proceedings under this section. *Gaya Electric Supply Co. Ltd.* v. *State of Bihar*,

A I R 1953 S C 182 (184) =1953 S C R 572=1953 S C J 217.

(44) *S. 34—Duty to refuse stay.*

The legal proceeding which is sought to be stayed must be in respect of matter which the parties have agreed to refer and which comes within the ambit of the arbitration agreement. Where, however a suit is commenced as to a matter which lies outside the submission, the Court is bound to refuse a stay. *Gaya Electric Supply Co. Ltd.* v. *State of Bihar*,

A I R 1953 S C 182 (184) (Supra).

(45) *S. 33—Application under—Award pronounced and filed in Court pending such application — Validity of award not challenged in lower courts — Appeal to Supreme Court — Amendment of application, if can be allowed.*

Pending an application under S. 33, Arbitration Act, the award was pronounced by the arbitrator and filed in Court. The petition under S. 33 was dismissed by the two Courts. On appeal to the Supreme Court, the applicant contended for the first time that the award was invalid since it was made in spite of the Court's injunction directing the arbitrator not to pronounce any award and sought to amend his application by introducing certain additional facts and adding a prayer for declaring that the award invalid :

Held, that it was open in law to the applicant to file objections to the award in the Court where the award was filed. But not having taken that course and not having made any application in the Courts below for amending the petition under S. 33, the applicant could not ask the Supreme Court to go into the validity of the award by widening the scope of the original petition. The Supreme Court is always in favour of shortening litigation; but it would be a very unusual step to allow the petition under S. 33 to be amended now and to decide a question involving investigation of facts without having the benefit of the judgments of the Courts below. *Ruby General Insurance Company* v. *Pearey Lal*.

AIR 1952 S C 119=1952 S C R 501 =1952 S C J 156.

(46) *S. 33 — Policy of insurance containing arbitration clause—All differences arising out of policy to be referred to arbitration —Reference made after time fixed in clause — Application under S. 33 — Maintainability.*

A policy of motor insurance contained the following arbitration clause : 'All differences arising out of this policy shall be referred to the decision of an arbitrator to be appointed in writing by the parties in difference or if they cannot agree upon a single arbitrator to the decision of two arbitrators one to be appointed in writing

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by each of the parties within one calendar month.....If the company shall disclaim liability to the insured for any claim hereunder and such claim shall not within twelve calendar months from the date of such disclaimer have been referred to arbitration under the provisions herein contained then the claim shall for all purposes be deemed to have been abandoned and shall not thereafter be recoverable hereunder.' The policy-holder made a claim upon the company for the loss of his car in communal riots. The company repudiated its liability under the policy on three successive occasions, the last of such disclaimer being on 1.8.1948. On 21.11.1949 the policy holder appointed an arbitrator. The company thereupon made an application under S. 33, Arbitration Act, praying for a declaration that the reference was illegal and for an injunction to restrain the arbitrator from proceeding in the matter. The company's case was that as the appointment of arbitrator was made more than 12 months after even the last disclaimer by it, the claim must be deemed to have been abandoned. The case of the policy holder, on the other land, was that there was no valid disclaimer by the company. The question for decision was whether the point in dispute fell to be decided by the arbitrator as being a difference 'arising out of the policy' or by the Court under S. 33, Arbitration Act : *Held*, that the test in such cases is whether recourse to the contract by which the parties are bound is necessary for the purpose of determining the matter in dispute between them. If such recourse to the contract is necessary, then the matter must come within the scope of the arbitrator's jurisdiction. In the present case, both the parties admitted the contract and stated that they were bound by it. In fact each of them relied upon it to support its case. The difference between the parties was therefore a difference arising out of the policy and the arbitrator had jurisdiction to decide it, the parties having made him the sole judge of all differences arising out of the policy : A I R 1951 Punj 440, *Affirmed*; A I R 1951 S C 9; 1942.1 All E R 337; 1925 A C 619 and (1917) 2 K B 433, *Rel. on.*

No question of determining the effect of the arbitration agreement arose because there was no dispute between the parties as

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to what it meant. The language of the arbitration clause was quite clear, and both parties construed it in the same way. The real question between them was whether the policy holder had or had not complied with the conditions of the agreement. But this question did not turn on the effect of the agreement. *Ruby General Insurance Company* v. *Pearey Lal.*

AIR 1952 S C 119 (Supra).

ASSAM FOOD GRAINS CONTROL ORDER, 1947

(47) *S. 2 (3) (a) — "Directors" for the purposes of the Act—Additional Deputy Commissioner is also a director.*

Under sub-s. (3) (a) of S. 2 of the Assam Food Grains Control Order, 1947, "Director" means "The Director of Supply, Assam, and includes, for the purpose of any specific provision of the Order, any other officer duly authorised in that behalf by him or by the Provincial Government by notification in the official Gazette." A notification dated 16th May 1950, and published in the Assam Gazette of 24th May 1950 notified a certain officer as an Additional Deputy Commissioner. All Deputy Commissioners in Assam were notified as Directors for the purposes of the said Order. On a contention being raised that the said officer was not a director as he was not a Deputy Commissioner, having been notified as Additional Deputy Commissioner only.

Held, that there was no warrant for drawing a distinction between a Deputy Commissioner and an Additional Deputy Commissioner in this respect and moreover it was a question of fact which would have to be investigated afresh, and could not, therefore, be allowed to be raised in the Supreme Court for the first time. *Rameshwar Bhartia* v. *State of Assam*,

A I R 1952 S C 405
=1953 S C R 126=1952 S C J 559.

ASSAM LAND AND REVENUE REGULATION, 1866

(48) *Ss. 16, 155 and Rr. 190, 190A — Settlement of fishery and cancellation— (Evidence Act (1872), S. 114.)*

Deputy Commissioner, according to the letter of Government, selling fishery by auction to A and then sending matter to Government direct for sanction instead of to the Commissioner — Government sanctioning settlement according to recommendation

Assam Land and Revenue Regulation, 1866

of Deputy Commissioner and latter communicating sanction to A —:Subsequently settlement in favour of A cancelled and fishery resettled in favour of another body —Acts of cancellation and resettlement held were those of Deputy Commissioner and not of Government though he acted under direction of Government—Under R. 190 High Court had jurisdiction to entertain appeal by A against his decision—High Court held was right in restoring settlement with A. *The State of Assam* v. *Keshab Prasad Singh*,

A I R 1953 S C 309 =1953 S C R 865=1953 S C J 429.

AWARD

See A. I. R. 1953 S. C. 41 under U. P. Industrial Disputes Act

BANKING COMPANIES ACT, 1949

(49) *S. 45-B—Normal proceeding under section—55 Cal W N 400, OVERRULED.*

Where the liquidator has to approach the Court under S. 45-B for relief in respect of matters legitimately falling within the scope thereof, elaborate proceedings by way of a suit involving time and expense, to the detriment of the ultimate interests of the company under liquidation, were not contemplated. In the absence of any specific provision in this behalf in the Act itself and in the absence of any rules framed by the High Court concerned under S. 45-G, the procedure must be taken to be one left to the judgment and discretion of the Court having regard to the nature of the claim and of the questions therein involved, S. 45-B is not confined to claims for recovery of money or recovery of property, movable or immovable, but comprehends all sorts of claims which relate to or arise in the course of winding up. Obviously the normal proceeding that the section contemplated must be taken to be a summary proceeding by way of application. 55 Cal W N 400, OVERRULED. *Dhirendra Chandra Pal* v. *Associated Bank of Tripura Ltd.*,

AIR 1955 S C 213=25 Com Cas 19 =1955 S C A 72.

BAR COUNCILS ACT, 1926

(50) *S. 9 (1) Proviso — Validity — Contravention of Art. 19 (1) (g)—(Constitution of India, Art. 19 (1) (g).)*

The proviso to sub-section (1) of section 9 of the Indian Bar Councils Act is not void, as being an unreasonable restriction upon the freedom to practise a profession, or to carry on an occupation, trade or calling, which is guaranteed under Article 19 (1) (g) of the Constitution. *Babul Chandra Mitra* v. *The Chief Justice and other Judges of Patna High Court*,

A I R 1954 S. C. 524 (525).

(51) *S. 10—Misconduct — Disciplinary action—(Cr. P. C., S. 162).*

In an enquiry under S. 10 (1), Bar Councils Act, an advocate was charged that (1) he asked for and was supplied with a copy of a statement under S. 162, Cr. P. C. of a witness examined by police, even though he was not cited as a witness in the Sessions Court, by misleading the Court into thinking that he was such a witness and (2) that in a trial for rape, he attempted to put to the prosecutrix some indecent and unnecessary questions which were disallowed by the Court. The High Court held that the action of the advocate mentioned in the first charge was a piece of sharp practice unworthy of a member of the Bar amounting to professional misconduct and that the conduct referred to in the second charge reflected on his capacity as a lawyer. He was, therefore, suspended from practice for six months. On an appeal to Supreme Court.

Held, that regardless of the motive of the Advocate the Court also had failed to exercise its jurisdiction in not refusing the application in view of the express provisions of S. 162, Criminal P. C. and that the Advocate's conduct in obtaining the copy would not be called a piece of sharp practice justifying suspension from practice. That with regard to the second charge the subject matter of the questions and the manner in which they were put did suggest that the advocate exceeded the legitimate bounds of his privilege to some extent. But in view of all the circumstances of the case, the case did not deserve to serve disciplinary action such as suspension from practice for six months and the ends of justice would be served by letting of the advocate with a warning. *Shiv Narain Jafa* v. *The Hon' ble Judges of the High Court of Judicature at Allahabad*,

A I R 1953 S C 368 (370) =1953 S C J 529.

(52) *S. 10 (2)—Scope.*

Under S. 10 (2) the High Court can make a reference 'of its own motion' even

Bar Councils Act (1926)

if there is no complaint made to it. *Mr. 'G' a Senior Advocate of the Supreme Court* v. *The Hon'ble Chief Justice and Judges of the High Court of Judicature at Bombay*,

A I R 1954 S C 560 (561)
=1954 S C J 631.

(53) *Ss. 10 (2) and 11 (2)—Oral order of reference.*

Under S. 10 (2) of the Bar Councils Act when the High Court makes a reference it is necessary that there should be some record of the order on the files but, the order itself need not be a written one; it can be an oral order given to a proper officer of the Court. *Held*, on facts that there was a sufficient record of the order for purposes of Ss. 10 *(2)* and 11 *(2)* and that the Tribunal was validly appointed. Mr. *'G' a Senior Advocate of the Supreme Court* v. *The Hon'ble Chief Justice and Judges of the High Court of Judicature at Bombay*,

A I R 1954 S C 560 (561)
=1954 S C J 631.

(54) *S. 12 — Order under — Appeal to Supreme Court—Proper parties to appeal —(Constitution of India, Art. 136).*

In an appeal arising out of a proceeding under the Bar Councils Act the appropriate parties should be the advocate concerned, the complainant, if any, the Bar Council or the secretary thereof and the Advocate-General of the State concerned to whom notices have to be issued under Section 12 (3) of that Act. It is wholly wrong and inappropriate for the appellant to make the Judges of the High Court respondents to the appeal. *Bhataraju Nageshwara Rao* v. *Hon'ble Judges of the Madras High Court & others*,

A I R 1955 S C 223.

(55) *S. 12 (4) — Charges of receipt of money for payment of fine and not depositing it in Court and of denial of receipt of money—Charges held not proved.*

Where an advocate was charged with wrongfully withholding the amount of Rs. 300 belonging to the client without depositing into Court as represented by him and also without refunding it to the client in spite of repeated requests and demands made by him and of falsely setting up a plea of not having received the said sum from the client, for which he had passed a receipt in his favour, and later on setting up that he wanted to borrow the said amount from him during the subsistence of the relationship of advocate and client, which (borrowing from a client) itself was prohibited by law." *Held*, on examining the facts and circumstances of the case that the charges had not been brought home to the appellant, or at any rate, the appellant was entitled to the benefit of doubt. *Bhataraju Nageshwara Rao* v. *Hon'ble Judges of the Madras High Court & others.*

A I R 1955 S C 223.

Beng. Agri. Income-tax Act, 1944

BENGAL AGRICULTURAL INCOME-TAX ACT, 1944 (IV of 1944)

(56) *Ss. 24 and 57—Bengal Agricultural Income-tax Rules, 1944, framed under S. 57, R. 11—Form No. 5—Return under S. 24 — Declaration signed by illiterate assessee by pen of his son if valid.*

Per *Das, Fazl Ali, Patanjali Sastri and Mukherjea JJ.*—There are many indications in the Bengal Agricultural Income-tax Act, 1944, and the rules framed thereunder evidencing an intention to exclude the common law rule *qui facit per alium facit per se*, in the matter of the signature of the assessee, appellant or applicant on the return, appeal or application. The omission of a definition of the expression "sign" so as to include the signature of an agent, the presence of the provisions permitting only certain specified acts, other than signing, to be done by or through an authorised agent are significant and indicate that the intention of the Legislature is not to permit signature by an agent.

Clause *(a)* of foot-note to Form No. 5 of the Act specifically requires that the declaration in the return under S. 24 of the Act shall be signed "in the case of an individual by the individual himself," *i. e.* personally and not by an agent.

Accordingly, the declaration in the form of return signed by the illiterate assessee by the pen of his son, when there is no physical contact between the assessee and the signature on the return, cannot be treated as properly signed and a valid return. 53 C. W. N. 744, REVERSED.

(Mahajan J., however, refused to express any opinion on the question whether an agent can sign for an assessee a form of return under the Act as that enquiry was outside the scope of the question referred to the High Court. His Lordship held that in the absence of any material on the record to

show that the assessee had not touched the pen or the hand of the son who had put the signature on the return, it must be held that the assessee signed it personally and therefore no question of agency arose in the case. The return was therefore properly signed by the assessee and was valid.) *Commr. Agril. I. T.* v. *Keshab Chandra*,

A I R 1950 S C 265
=1950 S C J 364=1950 S C R 435.

BENGAL ALLUVION & DILUVION REGULATION (XI [11] of 1825)

(57) *Ss. 2, 4 (2) — Custom of Dhar Dhura — Custom—Proof — Evidence Act (1872), Ss. 101 to 103: A. I. R. (30) 1943 All. 68*, REVERSED.

The meaning of the custom of *Dhar Dhura* is that the deep stream or channel of a river is to be regarded, irrespective of its changes as the constant boundary between two or more villages. The application of the deep stream rule might work injustice in certain cases as the gain or loss of property is made to depend upon accidental and uncertain phenomena or mere caprice of nature; but on the other hand the custom affords a convenient and effective way of avoiding boundary disputes which might otherwise be a fruitful source of strife and contention between riparian proprietors. A custom must not certainly be against reasons but the reason referred to here is not to be understood as meanning every unlearned man's reason but artificial and legal reason warranted by authority of law. It is sufficient if no good legal reason can be assigned against it. Prevention of quarrels and disputes between contiguous villages and estates is certainly an object beneficial to the community and judged by this test, the custom of *Dhar Dhura* cannot be held to be unreasonable.

The custom of *Dhar Dhura* prevails between the village Sikha on one side and villages Jhawa Nagla and Gurganwan on the other irrespective of whether the change in the course of the river Ram Ganga was gradual or sudden. The record of rights speaks of change by alluvial action of the river. It does not say whether such alluvial action should be gradual or sudden; by itself, therefore, it does not indicate with precision the ambit of the right that is connoted by the custom. This is a matter which has got to be determined upon the evidence adduced by the parties and

the onus of proof is undoubtedly on the person who sets up a custom at variance with the general law. There is documentary and oral evidence in favour of the existence of such custom.

It is, however, absolutely necessary that the main stream of the river must flow within the limits of these villages. It is only for the purpose of determining the boundary between certain villages and estates that the custom of *Dhar Dhura* can be invoked, and unless the river actually divides the villages or estates, there can be no question of its being regarded as a boundary line between them and in such circumstances the deep stream rule cannot possibly have any meaning.

When the river ceases to divide the estate, the rights of the riparian proprietor can be determined only in accordance with the provisions made in the Regulation itself. In the year 1341 Fasli the river suddenly changed its course and as it shifted to the north and west beyond the limits of mouza Sikha, the custom of *Dhar Dhura* would no longer govern the rights of the parties and the title to the plot of land, the subject-matter of dispute, must be determined in accordance with provisions of the Regulation itself. As the change in the course of the river was sudden and not gradual and the character and identity of the land have remained intact, the plaintiff would clearly be entitled to possess the land on the strength of his original title as provided for in S. 4, Cl. 2: A. I. R. (30) 1943 All. 68, REVERSED. *Ram Dhan Lal* v. *Radhe Sham*,

A I R 1951 S C 210
=1951 S C J 307=1951 S C R 370.

BENGAL GHATWALI LAND REGULATION (XXIX of 1814)

(58) *Ghatwali tenure—Birbhum Ghatwals — Nature of—Succession of joint family — Last Ghatwal dying—Leaving widow only — Widow succeeds in preference to male agnate — Hindu Law — Impartible estates — Succession.*

Among the Birbhum Ghatwals governed by the Regulation 29 of 1814, where the last Ghatwal dies having a widow but no issue, she succeeds in preference to the nearest male agnate even though the family may be joint : 28 Pat 215, *Affirmed*.

Per *Mahajan and Bose JJ.* — The result of the decided cases and of the provisions of the Regulation XXIX of 1814 is that the

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grantee of the tenure and his descendants have to be maintained in possession of the land from generation conditional upon services to be rendered. The tenure is, however, liable to forfeiture for misconduct or misbehaviour of the ghatwal for the time being.

The succession to it is determined by the rule of lineal primogeniture. It is neither partible nor alienable except in the exceptional cases with the consent of the Government or the zamindar, as the case may be. These two characteristics are inherent in its very nature and have not been annexed to it by any rule of custom. The estate in the hands of the last holder is not liable either to attachment or sale in execution of a decree against him; nor is it liable in the hands of his successors for payment of his debts. When the succession opens out the heir determined according to law has to execute a muchilika in favour ot the grantor guaranteeing the performance of the duties annexed to the office and stipulating that in case of misconduct or mis-behaviour or non-fulfilment of the obligations attaching to the office as to which the tenure is in the nature of a remuneration Government will have the right to resume it.

In view of these peculiar characteristics of a ghatwali tenure in Birbhum which are so different from other inheritance, it is difficult to apply to it the law of Mitakshara to the full extent. The incidents attaching to a Birbhum Ghatwal tenure rule out the existence of any notion of community of interest and unity of possession of the members of the family with the holder for the time being. He is entitled to be maintained in exclusive possession of the Ghatwal lands and the devolution of the property is to him in the status of sole heir.

In Birbhum ghatwali tenures are in the nature of separate property or the exclusive property of the ghatwal and whenever succession opens out in respect of them it has to be determined according to the Mitakshara rule applicable to the devolution of separate property irrespective of the circumstances whether the deceased died in joint or separate status with the other members of the family. The Mitakshara rule that the property inherited by a person from his immediate paternal ancestors become ancestral in his hands and in it his sons, grandsons and great-grandsons acquire a right at the moment of the birth

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has no apposite application to Birbhum ghatwali tenures.

The Regulation does not enact any rule of succession to those tenures, and the devolution with respect to them is admittedly determined by personal law or custom. The expression 'descendants' used in the Regulation cannot deprive female like a widow or a mother from taking the inheritance where they are legal heirs under the Mitakshara law or under custom. The expression 'descendants' has been loosely employed in the regulation for the word 'heirs.'

Per *Fazl Ali J.*—It will not be incorrect to say that custom and usage are also important factors governing succession to ghatwali property and it is conceivable that while in some cases custom may develop on the lines of the Hindu Law relating to succession owing to repeated instances of tacit and unquestioned application of the law, in other cases succession to ghatwali property may be governed not entirely by the Hindu law but by such law as modified in certain respects by usage and the custom. Hindu law has been modified by custom so far as the Birbhum Ghatwals are concerned. *Tikait Hargobind Prasad Singh* v. *Srimati Phaldani Kumari*

A I R 1952 S C 38=1952 S C R 153 =1951 S C J 824.

BENGAL LAND REVENUE SALES ACT (XI OF 1859)

(59) *Ss. 2 and 3 — Determination of arrears—Crucial date.*

Where a kistbandi or a kabuliyat regulating the payment of Government revenue is shown to have been executed by the proprietors and accepted by the revenue authorities, it should be deemed to be in force although the Touzi itself has been sub-divided subsequently. The question whether instalments of revenue have become arrears has to be determined only according to S. 2 and the crucial dates for determining that question will be the dates on which they fall due under the agreement and not the dates fixed by the Board of Revenue under S. 3. The agreement cannot be held to have fallen into desuetude on the ground that the authorities and the parties have both treated the latter dates as the crucial dates. The mere fact that the sums have been shown as 'demand' in the Touzi Register cannot be

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conclusive of their being 'arrears' within S. 2. *Kali Ram* v. *S. K. Ulfat Hussain*

A I R 1951 S C 6=1951 S C J 242.

(60) *Ss. 6, 13, 14 and 37 — Separate accounts — All shares in default — Sale of separate shares as such and not of entire estate.*

Touzi No. 2409 was distributed into two shares, one being a separate account bearing No. 249/1 and the other being the residuary share. Both these shares came, in course of time to be held by a single person. The landlord failed to pay the *kist* of the revenue and cesses of the touzi in both the accounts, with the result that both the undivided half shares of the touzi represented by separate account No. 1 and by residuary account were advertised for sale on 24-6-1939 under S. 6. The notice advertising the sale notified sales of the shares in the estate as such and did not state that the entire estate would be sold. The arrears due from the two shares were entered separately. Both these shares were actually sold on the issue of a single notice and at a single sale. The sale certificate showed that what was certified to have been purchased by the purchaser was the separate account share as also the residuary share making up between them the totality of the touzi : *Held*, that what was actually put up for sale were two separate shares in the estate which made up the totality of the estate. The sale could not be deemed to have been of an entire estate on the ground that both the shares sold constituted the totality of the estate. Section 13 empowers the Collector, where separate accounts are kept, to sell the shares in default as such, there being no scope for the operation of Para. 2 of the section where all the shares are in default. There is nothing in that section which disentitles the Collector, where two separate accounts have been kept and both of them are in default, to notify for sale the separate accounts for recovery of arrears due from each of them separately, or to bring several defaulting shares to sale all at once without following the procedure laid down in S. 13. As the purchaser at the revenue sale did not become the purchaser of the entire touzi as such he did not become entitled to the privileges conferred on such a purchaser by the provisions of S. 37. *Gunendra Nath Mitra* v. *Satish Chandra Hui*

A I R 1953 S C 42 =1953 S C R 277=1953 S C J 6.

Bengal Money Lenders Act, 1940

(61)—*S. 33 — Revenue sale for arrears — Appeal to Commissioner under S. 2, Bengal Land Revenue Sales Act, 1868.*

Annulment of sale sought clearly on ground that there was no arrears on specified date — Kistabandi to establish plea is evidential matter and not a ground—Failure to specifically put forward kistbandi in petition of appeal does not preclude party from relying on it in suit. *Kali Ram* v. *S. K. Ulfat Hussain*

A I R 1951 S C 6=1951 S C J 242.

BENGAL LAND REVENUE SALES (WEST BENGAL AMENDMENT) ACT (7 of 1950)

(62)—*S. 7—Validity of.*

Section 7 is 'intra vires' the Constitution of India, Arts. 19 (1) (f) and 31. *State of West Bengal* v. *Subodh Gopal Bose & others*

A I R 1954 S C 92 (102, 117).

See also Constitution of India, Art. 19 and Art. 31.

BENGAL MONEY LENDERS ACT (10 of 1940)

(63)—*Ss. 2 (22) and 36 (1), Proviso (ii) —'Suit to which this Act applies' — Mortgage decree passed prior to 1-1-1939 — Re-opening of—Civil P. C. (1908), O. 21, R. 57 (Cal).*

A in execution of his mortgage decree obtained in 1929, purchased the mortgaged property and on 30-10-1935 obtained a personal decree for the balance against the mortgagor *B*. In 1936 *A* in execution of his personal decree attached certain properties as belonging to the judgment-debtor *B*. *B* and his two sons filed objections to attachment. Negotiations for settlement were started and eventually on 30-1-1937 in pursuance of petition filed by the parties the execution case was struck off keeping the attachment in force. On 4-1-1939 *B* and his two sons conveyed to *A* certain property in full satisfaction of the personal decree. On 2-6-1939 *A* filed a petition to the executing Court praying for withdrawal of the attachment kept in force on ground that the decree had been adjusted and the Court cancelled the attachment and recorded adjustment of the decree accordingly. On *B's* death in 1940, his two sons as the legal representatives of *B* became 'borrowers' within the meaning of the Bengal Money Lenders Act which had come into force on

Bengal Money Lenders Act (1940)

1.9.1940 and on 2.1.1941 they filed a suit against *A* praying for relief under S. 36 of the Act by re-opening of the transactions and taking accounts. The question was whether the mortgage decree of 1929 could be reopened under the second proviso to S. 36 (1) of the Act :

Held, (Per *Das J. and Kania C. J.*) — that the decree sought to be reopened was not a decree made in "a suit to which this Act applies" within the meaning of S. 2 *(22)* of the Act and as such the plaintiff could not get any relief in view of the second proviso to S. 36 *(1)*. Neither the suit in which the mortgage decree was obtained nor any proceeding in execution of that decree was pending on 1.1.1939. The order dated 30.1.1937 was a final order which brought the execution case of 1936 to an end and the attachment continued, not because there was a pending execution proceeding but because a special order was made under O. 21, R. 57, Civil P. C as amended by the Calcutta High Court. The petition dated 2 1.1939 was purely an intimation given to the Court and was not an application such as would initiate a proceeding in execution for any of the purposes mentioned in cls. *(a)* or *(b)* or *(c)* of S. 2 (22) of the Act : 48 Cal. W. N. 406 (S. B.), *Approved*; A. I. R. (36) 1949 Cal. 266, *Affirmed*.

Per *Patanjali Sastri J.*— The effect of the order dated 30.1.1937 was not to put an end to the execution proceeding altogether. Order 21, R. 57 (Cal.) envisages a dismissal of an 'application for execution' while at the same time continuing a subsisting attachment. Attachment itself is a 'proceeding in execution' and so long as it subsists the proceeding in execution can well be regarded as pending. The attachment was cancelled by the Court only on 2.6.1939 when the decree in question was recorded as adjusted and then, and not before, could execution of the decree be properly considered to have terminated. In this view, a "proceeding in execution" was pending on 1.1.1939, and *A's* decree must be taken to have been passed "in a suit to which this Act applies," with the result that *A's* claim to exemption under Proviso *(ii)* to sub-s. *(1)* of S. 36 of the Act must fail. *Pashupatinath Malia* v. *Deba Prosanna*, **A I R 1951 S C 447 =1951 S C J 506=1951 S C R 572.**

Bengal Money Lenders Act (1940)

(64) *S. 36—Power of re-opening decrees.*

The drafting of S. 36 is indeed obscure and somewhat clumsy, but it is clear that the power of re-opening a transaction as contemplated by the section, extends to reopening of decrees as well. *Oramba Sundri Dasi* v. *S. S. Ishwar Gopal Jieu*,

A I R 1954 S C 309 =1954 S C J 423.

(65) *S. 36 (2) (b) and (c) — Bona fide acquisition of rights — Enquiry as to whether decree-holder is benamidar.*

For the purpose of giving effect to cls. *(b)* and *(c)*, the Court has not only the right but is under a duty to make an enquiry as to whether the ostensible purchaser at the execution sale, or the person who purports to have acquired an interest therein under a subsequent transfer from the decree-holder purchaser, has *bona fide* acquired such rights within the meaning of Cl. (b). But in making a new decree under Cl. (a) of S. 36 *(2)* and giving the judgment-debtor consequential relief under Cl. (c) of the sub-section, the court cannot at all enter into the question as to whether the decree-holder on record is himself a benamidar for another person in respect of the decree. Such enquiry is altogether outside the purview of the different clauses of S. 36 *(2)*. A I R 1949 Cal. 315, REVERSED. *Oramta Sundri Dasi* v. *S. S. Ishwar Gopal Jieu*.

A I R 1954 S C 309 =1954 S C J 423.

(66) *S. 36 (2) — Re-opening of decree —Purpose of — Effect on old decree.*

The court reopens a decree under S. 36 *(2)* only for the purpose and so far as it is necessary to give relief to the borrower in the manner provided for in the Act, namely, to release him from all liability for interest in excess of the limits prescribed by S. 30 of the Act. A new decree is passed only for the purpose of substituting the method of accounting sanctioned by the Act for the calculations upon which the original decree was passed and to give an opportunity to the judgment-debtor to pay the decretal dues thus ascertained by instalments. But save and except for these, the old decree as well as the adjudications made thereunder are not wiped out and the parties are not relegated to their rights and liabilities under

the original cause of action. *Oramba Sundri Dasi* v. *S. S. Ishwar Gopal Jieu*,
A I R 1954 S C 309
=1954 S C J 423.

(67) *S. 36 (5) — Sut-mortgagee if assignee within S. 36 (5).*

Per *Patanjali Sastri J.* — Where a sub-mortgage also contains an assignment of the debt due under the original mortgage and of the entire interest of the original mortgagee, the sub-mortgagee obtains by virtue of the sub-mortgage the right to sue the original mortgagor for recovery of the mortgage debt in his own right so as to make him an assignee within S. 36 (5) of the Act; A I R (36) 1949 P C 183; A I R (28) 1941 P C 36 and A I R (26) 1939 P C 14, *Ref. Pashupatinath Malia* v. *Deba Prosanna*, A I R 1951 S C 447
=1951 S C J 506=1951 S C R 572.

BENGAL MUNICIPAL ACT, 1952.

See Municipal Acts.

(WEST) BENGAL PREMISES RENT CONTROL TEMPORARY PROVISIONS ACT (17 of 1950).

(68) S. 12, Expl.—Scope — Explanation is inserted in the section out of abundant caution. *Nalinakhya* v. *Shyam Sunder*,
A I R 1953 S C 148
=1953 S C R 533
=1953 S C J 201

(69) *S. 18 (1) — Section does not apply to order for possession under S. 43, Presy. Sm. C. C. Act, 1882 — (Presidency Small Cause Courts Act (1882), S. 43).*

Section 18 (1) does not refer to "decree" simpliciter but to "any decree for recovery of possession of any premises" on the ground of default in payment of arrears of rent under the provisions of the 1948 Act. A decree for possession on the ground of non-payment of rent under that Act is treated distinctly from an order for possession on the ground of non-payment of rent under the same Act. A decree for the recovery of possession within the meaning of that Act can, therefore, only mean a decree in a suit for recovery of possession and cannot cover an order for possession passed under S. 43 on an application made under S. 41 of the Presidency Small Cause Courts Act.

Even by attributing the ordinarily accepted meaning as given in S. 2 (2), Civil P. C., to the word 'decree' in S. 18 (1), it cannot cover an order for possession passed

under S. 43, Presy. Sm. C. C. Act, 1882 as it is made on an application. Further, there is no substantial reason to give an extented meaning to the word 'suit' or 'decree' in the Act. A I R 1951 Cal 32: 55 Cal W N 343; 55 Cal W N 347; 55 Cal W N 421; A I R 1952 Cal 126: 55 Cal W N 563 and A I R 1952 Cal 273: 55 Cal W N 719 (FB), OVERRULED; A I R 1952 Cal 199, REVERSED. *Nalinakhya* v. *Shyam Sunder*,
A I R 1953 S C 148=1953 S C R 533
= 1953 S C J 201.

BIHAR BUILDINGS (LEASE, RENT AND EVICTION) CONTROL ACT (III [3] of 1947).

(70) *S. 11 (1) (a)—Controller ordering eviction for non-payment—Jurisdiction of Civil Court to question order — C. P. C. (1908), S. 9.*

The Act has entrusted the Controller with a jurisdiction which includes the jurisdiction to determine whether there is non-payment of rent or not, as well as the jurisdiction, on finding that there is non-payment of rent, to order eviction of a tenant. Therefore even if the Controller wrongly decides the question of non-payment of rent and orders eviction of the tenant his order cannot be questioned in a civil Court. *Brij Raj Krishna* v. *Shaw & Bros.*, A I R 1951 S C 115
=1951 S C J 238=1951 S C R 145.

BIHAR LAND REFORMS ACT (XXX of 1950).

(71) *Ss. 2 (O), 41 — Bihar and Orissa General Clauses Act (1 of 1917), S. 4 (40) —'Proprietor' as defined by S. 2 (O) includes company.*

Whether the word 'person' in a statute can be treated as including a corporation depends on a consideration of the object of the statute and of the enactments passed with a view to carry that object into effect.

The term 'Proprietor' as defined by S. 2 (O), Bihar Land Reforms Act, read with S. 4 (40), Bihar General Clauses Act, includes a company. In view of the object of the Bihar Land Reforms Act, there is no reason to differentiate between an individual proprietor and a company which owns estates or tenures. Indeed, there is not only nothing repugnant in the subject or context of the Act which should prevent the inclusion of a company owning estate within

Bihar Land Reforms Act (1950)

the definition of "proprietor," such inclusion is necessary in order to give full effect to the very object of the Act: (1880) 5 A. C. 857, *Disting.*; A. I. R. 1953 Pat. 105, *Affirmed.*

Further S. 41 does not necessarily preclude the application of the Act to incorporated companies: (1944) 1 K. B. 146 and (1944) 1 K B. 551, *Ref., Motipur Zamindari Co. Ltd.* v. *State of Bihar and another,* A I R 1953 S C 320 =1953 S C R 720=1953 S C J 451.

(72) *S. 3—Notification under, relating to patnies comprising lands both within and outside Bihar—Validity.*

Where the patni leases comprise land both within and outside Bihar, the notification under S. 3 relating to them is not invalid on the ground that part of the estate which is in Bihar cannot be severed from rest. It is a simple case of apportionment of the revenue and also apportionment of the rent. The necessity for such apportionment cannot possibly affect the validity of the notification. *Motipur Zamindari Co. Ltd.* v. *State of Bihar & another,* A I R 1953 S C 320 =1953 S C R 720=1953 S C J 451.

(73) *Ss. 32 (2) and 43 — Act is not unenforceable.*

It was argued that the Act is unenforceable in that S. 32 *(2)* provides for compensation, without specifying the period of interval between the instalments:

Held (Per Mahajan J.): that the Act has made sufficient provision for enforcing its provisions if S. 32 *(2)* is read with the provisions contained in S. 43 and it cannot be said that the Act is unenforceable for this reason. *State of Bihar* v. *Kamleshwar Singh,* A I R 1952 S C 252 =1952 S C R 889=1952 S C J 354.

(74) *Section 32 (2)—Validity—Section is not bad on ground that it is piece of unregulated delegation of legislative power — Constitution of India, Art. 245 and Sch. 7, List III, Entry 42.*

Section 32 *(2)* of the Act cannot be held bad on the ground that it is a piece of unregulated delegation of legislative power.

The legislature has applied its mind to the form in which compensation has to be paid and has fixed the number of equal instalments in which it should be paid. It has also provided for payment of interest on the compensation amount in the mean-

Bihar Tenancy Act (1937)

time. The proportion in which the compensation could be paid in cash and in bonds and the intervals between the instalments have been left to be determined by the Executive Government as those must necessarily depend on the financial resources of the State and the availability of funds in regard to which the Executive Government alone can have special means of knowledge. By no standard of permissible delegation can the vesting of such limited discretion by a legislature in an administrative body be held incompetent. *State of Bihar* v. *Kamleshwar Singh,* A I R 1952 S C 252 =1952 S C R 889=1952 S C J 354

BIHAR MONEY-LENDERS (REGULATION OF TRANSACTIONS) ACT (VII of 1939)

(75) *S. 7—Loan based on document — Document refers to final document.*

A borrowed Rs. 40,000 from *B* under mortgage bond dated 11-1-1893. From time to time large amounts by way of payments towards the principal, interest and compound interest were made and for the balance remaining due fresh mortgage bonds were executed. Of such bonds the latest was a mortgage bond for Rs. 42,000 dated 6-10-1931 and for the balance of loan remaining still due, on the same date two hand notes were also executed by *A*. When *B* tried to execute the decree passed in his favour in respect of the loan based on hand notes, *A* contended that for the purpose of calculating the interest to be decreed prior to the date of the suit the loan advanced should be taken to be the original sum and that if an account is taken of all the sums received by *B* as interest from that date up to the date of the suit, there would be nothing due for interest:

Held rejecting the contention that under S. 7 the loan must relate to the document on which the suit was based, that is, the final document and not the original document. View taken by Patna High Court in A. I. R. (27) 1940 Pat 65; A. I R. (29) 1942 Pat 138 and A. I. R. (31) 1944 Pat. 303 (FB), *Affirmed. Ramnandan* v. *Kapaldeo* A I R 1951 S C 155 =1951 S C J 199=1951 S C R 138.

BIHAR TENANCY ACT (1937)

(76) *Ss. 5 (2), 20 & 21—Zurpeshgi lease by mortgagee for three years — Land con-*

tinued in possession of tenants for over 30 years—Permanent right of occupancy not acquired.

Where a *Zurpeshgi ijara* deed contained the following clause : "it is desired that the *ijaradars* should enter into possession and occupation of the share let out in ijara (being the khudkasht land under his own cultivation), cultivate them, pay 2 as. as reserved rent year after year to us, the executants, and appropriate the produce thereof year after year on account of his having the ijara interest" and the kabuliat executed by the tenant to whom the lands were leased by the mortgagee for a period of three years referred to the ijara deed and contained an express provision that he (the tenant) would give up possession of the tika land on the expiry of the lease without urging any claim on the score that the lands were his kasht lands : Held, confirming the decision of the High Court, that the settlement was not a *bona fide* one and the successors of the tenant (the defendants) did not acquire permanent rights of occupancy in the demised lands under the Bihar Tenancy Act even though the lands had been in the occupation of the tenant and his successors for over 30 years after the expiry of the lease.

Held further, that the defendants could not acquire occupancy rights under Ss. 20 & 21 of the Bihar Tenancy Act as the mortgagee was neither a "proprietor" nor a "tenure-holder" or "under-tenure-holder" and the tenant and his successors were not, therefore, "settled raiyats" within the meaning of Section 5, cl. *(2)* of the said Act. *Mahavir Gope* v. *Harbans Narain Singh*

A I R 1952 S C 205
=1952 SC J 292=1952 S C R 775.

BIHAR AND ORISSA SERVICE CODE

(77) *R. 95—Applicability.*

A Sub-Inspector of Police appointed by the Inspector General of Police was dismissed by the order of the Deputy I. G. of Police under the departmental enquiry. His further appeals to the I. G. and the Governor were rejected. He thereupon filed a suit against the State for declaration that the D. I. G's order was void and for arrears of his salary. The Chief Secretary to the Government wrote to the Inspector General of Police that the order of dismissal was untenable and he was reinstated at his instance. It was contended that his claim for arrears of salary could be made only under R. 95 of the Service Code. *Held*, that the rule had no application to the case as the reinstatement of the employee was not at the instance of any of the authorities mentioned therein and hence the enabling provision contained in it did not operate as a bar to his suit. *State of Bihar* v. *Abdul Majid*

AIR 1954 S C 245 (247)
=1954 S C J 300.

BIHAR SALES TAX ACT (VI of 1944)

(77A) *See A I R 1951 S C 14 under Sales Tax.*

BOMBAY BUILDING (CONTROL ON ERECTION) ORDINANCE (1 of 1948)

(78) *S. 1 (4) — Notification under, dated 15-1-1948 — (Bombay Building (Control on Erection) Act (31 of 1948), S. 15 (1) — (Bombay General Clauses Act (1 of 1904), S. 25)—(General Clauses Act (1897), S. 24) :* A I R 1951 Bom 263, REVERSED.

The Notification issued on 15-1-1948 under S. 1 (4) of the Ordinance extended not only the provisions of the Ordinance to the other areas in the Bombay State to the extent indicated in the Notification but also the provisions of Act 31 of 1948. *State of Bombay* v. *Pandurang*

A I R 1953 S C 244
=1953 S C R 773=1953 S C J 330.

BOMBAY CITY CIVIL COURT ACT (XL of 1948)

(79) *S. 3—Act is not ultra vires Bombay Legislature — Government of India Act (1935), S. 100, Sch. 7, List I, Items 28, 53; List II, Items 1, 2; List III, Items 4, 15.*

The Bombay City Civil Court Act is not *ultra vires* the Provincial Legislature by reason of its being an encroachment by the Provincial Legislature upon the field of legislation reserved for the centre under List I of Sch. 7 to the Government of India Act, 1935 : A. I. R. (36) 1949 Bom. 197, *Approved.*

Bombay City Civil Court Act (1948)

Per *Fazl Ali, Mahajan and Mukherjea JJ.* — The Act is *intra vires* the Bombay Legislature under Entry 1 of List II of that Schedule.

The legislative power conferred on the Provincial Legislature by Item 1 of List II has been conferred by use of language which is of the widest amplitude (administration of justice and constitution and organization of all Courts). The phrase employed would include within its ambit legislative power in respect to jurisdiction and power of Courts established for the purpose of administration of justice. Moreover, the words appear to be sufficient to confer upon the Provincial Legislature the right to regulate and provide for the whole machinery connected with the administration of justice in the Province. Legislation on the subject of administration of justice and constitution of Courts of justice would be ineffective and incomplete unless and until the Courts established under it were clothed with the jurisdiction and power to hear and decide causes.

This power conferred by Item 1 of List II is not curtailed or limited by power of legislation conferred on the two Legislatures under Items 53 of List I, 2 of List II and 15 of List III. On the other hand, these three items confer on the respective Legislatures power to legislate when dealing with particular subjects within their exclusive legislative field to make laws in respect to the jurisdiction and powers of Courts that will be competent to hear causes relating to those subjects; in other words this is a power of creating special jurisdiction only.

Per *Patanjali Sastri and Das JJ.* — Entry 2 read with Entry 1 in List II clearly authorised the Provincial Legislature to make a law conferring on or taking away from a Court general jurisdiction and powers relating to or touching or concerning or for administration of justice. Read in this view, the impugned Bombay Act may be well supported as a law made by the Provincial Legislature under Entry 2 read with Entry 1 in List II. *State of Bombay* v. *Narottamdas* **A I R 1951 S C 69 =1951 S C J 103=1951 C R 51.**

(80) — *S. 4 — Validity — S. 4 involves delegation of legislative power.*

Section 4 is not void and inoperative by reason of its amounting to a delegation of legislative powers by the Provincial Legislature to the Provincial Government of Bombay.

Bombay City Land Revenue Act, 1876

The Legislature in empowering the Provincial Government to invest the City Court, by notification, with jurisdiction of such value not exceeding Rs. 25,000 as may be specified in the notification, has not delegated its legislative authority to the Provincial Government. The provision relates only to the enforcement of the policy which the Legislature itself has laid down. The law was full and complete when it left the legislative chamber permitting the Provincial Government to increase the pecuniary jurisdiction of the City Court up to a certain amount which was specified in the Statute itself. What the Provincial Government is to do is not to make any law; it has to execute the will of the Legislature by determining the time at which and the extent to which, within the limits fixed by the Legislature, the jurisdiction of the Court should be extended. This is a species of conditional legislation which comes directly within the principle enunciated in *The Queen* v. *Burah*, 5 I. A. 178 (P. C.), where the taking effect of a particular provision of law is made to depend upon determination of certain facts and conditions by an outside authority : A. I. R. (36) 1949 F. C. 175, *Expl.* and *Disting*; 52 Bom. L. R. 571 : A. I. R. (38) 1951 Bom. 180, OVERRULED. *State of Bombay* v. *Narottamdas*,

A I R 1951 S C 69 =1951 S C J 103=1951 S C R 51.

BOMBAY CITY LAND REVENUE ACT (II [2] of 1876)

(81) *S. 8 — Right in limitation of Government's right to assess — Limited right acquired by adverse possession — Estoppel by representation — Limitation Act (1908), Art. 144 — Evidence Act (1872), S. 115 — Transfer of Property Act (1882), S. 53A.*

In 1865, the Government of Bombay, having decided to construct an Eastern Boulevard, called upon the Corporation of Justices of the Peace for the City of Bombay, the predecessor in title of the present Corporation, to remove its then existing fish and vegetable markets from

Bombay City Land Revenue Act (1876)

the site required for the construction of the Boulevard. The then Municipal Commissioner applied for the site set aside for the exhibition buildings on the Esplanade for the purpose of constructing new market as the existing markets could not be removed until new markets had been provided. On 5-12-1865, the Architectural Improvement Committee informed the Government that it had no objection to the proposed site measuring about 7 acres being "rented to the Municipal Commissioner." On 19-12-1865, the Government passed the following resolution :— "(1) Government approve of the site and authorise its grant. (2) The plans should be submitted for approval; the Government do not consider any rent should be charged to the Municipality as the markets will be, like other public buildings, for the benefit of the whole community." Pursuant to the aforesaid Resolution, possession of the site was made over to the then Municipal Commissioner, but no formal grant was executed as required by Statute 22 & 23 Vic. C. 41. The Municipal Commissioner had the site filled up and levelled at the expense of the Corporation. The plans were approved by the Government and the market buildings were erected by the Corporation at considerable expense. The present Corporation was incorporated in 1888 as the successor of the Corporation of the Justices of the Peace for the City of Bombay and it continued in possession of the land and the buildings without paying any rent to the Government according to the Government Resolution of 1865. On 18-3-1938, the Collector of Bombay informed the municipal Commissioner that it was proposed to assess the land occupied by the Crawford Market under S. 8, Bombay City Land Revenue Act II [2] of 1876. On 31-1-1940, the Collector assessed the land under S. 8 of the Bombay Act II [2] of 1876 : *Held* (1) that by reason of the non-compliance with the statutory formalities the Government Resolution of 1865 was not an effectual grant passing title in the land to the Corporation and was not also an enforceable contract.

(2) Per *Kania C. J., Das and Bose JJ., Patanjali Sastri J. contra* — The position of the Corporation and its predecessor in title was that of a person having no legal title but nevertheless holding

Bombay City Land Revenue Act (1876)

possession of the land under colour of an invalid grant of the land in perpetuity and free from rent for the purpose of a market. Such possession not being referable to any legal title it was *prima facie* adverse to the legal title of the Government as owner of the land from the very moment the predecessor in title of the Corporation took possession of the land under the invalid grant. This possession had continued openly, as of right and uninterruptedly for over 70 years and the Corporation had acquired the limited title to it and its predecessor in title had been prescribing for during all this period, that is to say, the right to hold the land in perpetuity, free from rent but only for the purposes of a market in terms of the Government Resolution of 1865. The immunity from the liability to pay rent was just as much an integral part or an inseverable incident of the title so acquired as was the obligation to hold the land for the purposes of a market and for no other purpose. There was no question of acquisition by adverse possession of the Government's prerogative right to levy assessment. The right acquired included as part of it, an immunity from payment of rent which necessarily constituted a right in limitations of the Government's right to assess in excess of the specific limit established and preserved by the Government Resolution within the meaning of S. 8 of the Bombay Act II [2] of 1876.

Per *Chandra Sekhara Aiyar J.*—Though the grant was invalid, the Corporation had now acquired a title by adverse possession to the site. Before a right could be said to be acquired or lost by adverse possession it must have been the subject of possession by a man without title as against the person with the rightful title. Right to levy assessment is a prerogative right of the Government and it is hard to conceive of a case where it could be said to be lost by adverse possession. True, there can be adverse possession of a limited right like that of a mortgagee or a lessee or even a permanent tenant, but still a right must have been enjoyed by the possessor adversely to the claim of the true owner. No right to levy assessment was exercised in this case before March, 1938, and the denial was only afterwards. When the Architectural Improvement Committee proposed to levy a nominal rent, the Government stated that

Bombay Cotton Contracts Act (1932)

no rent need be charged, as the markets to be built were for the benefit of the whole community. This was a representation made by the Government when the site was given and possession was taken. The accident that the grant was invalid did not wipe out the existence of the representation of the fact that it was acted upon by the Corporation. If the resolution could be read as meaning that the grant was of rent free land, the case would come strictly within the doctrine of estoppel enunciated in S. 115, Evidence Act. But even otherwise that is, if there was merely the holding out of a promise that no rent will be charged in the future, the Government must be deemed in the circumstances of this case to have bound themselves to fulfil it. Courts must do justice by the promotion of honesty and good faith, as far as it lies in their power. The decision of the Privy Council in A. I. R. 1931 P. C. 79, was not applicable to the facts of the case, as the doctrine of part performance was not being invoked to clothe a person with title which he could not acquire except by the pursuit of or in conformity with certain legal forms. Here the Corporation became the full absolute owner of the site on the lapse of 60 years from the date of the grant. Case law discussed. *Collector of Bombay* v. *Bombay Corporation,* **A I R 1951 S C 469 =1951 S C J 752 = 1952 S C R 43.**

(82) *S. 8—Applicability of, to total exemption from assessment.*

The words of S. 8 would apply to a case where total exemption from assessment was granted. In other words specific limit may be nil for the purposes of S. 8. *Collector of Bombay* v. *Bombay Corporation,* **A I R 1951 S C 469 Supra.**

BOMBAY COTTON CONTRACTS ACT (IV of 1932).

(83) *S. 8 (i)—Contract not in accordance with bye-laws of recognised association.*

Where in the contract note the last sentence providing for deposit at the end of the margin clause was missing and there was a rubber stamp impression which was reproduction of the sentence that used to be found at the end of the margin clause before the amendment of bye-law 51A of the East India Cotton Association and further the two new clauses under bye-law 65A had been omitted: *Held* that the contract was not in accordance with the bye-laws and was viod. *Khimji Poonja & Co.* v. *Baldeo Das,* **A I R 1950 S C 7 =1950 S C J 153=1950 S C R 31.**

Bombay District Police Act (1890)

BOMBAY DISTRICT POLICE ACT (X of 1890)

(84) *S. 61E—Gold found with accused —Conviction—Order of confiscation of gold under S. 517, Cr. P. C. held inappropriate— (Cr. P. C., S. 517).*

The power of the Court under S. 517 (1), Cr. P. C. no doubt extends to confiscation of property in custody of the Court but it is not every case in which the Court must necessarily pass an order of confiscation irrespective of the circumstances of the case.

It is possible to conceive of cases where the subject matter of the offence may be property which under the law relating to that offence is liable to be confiscated as a punishment on conviction. Section 517 contains a general provision for disposal of the property in the circumstances mentioned in the latter part of the section.

Section 61-E, Bombay District Police Act (10 of 1890), by itself does not empower the Court to impose the penalty of confiscation and the sentence of imprisonment and fine authorised by the section is a nominal sentence for the obvious reason that the section proceeds upon the mere belief that the property in possession of the person is stolen property or property fraudulently obtained possession of which is not satisfactorily accounted for.

Confiscation is not the only mode of disposal under S. 517 and is singularly inappropriate in a case where the accused is prosecuted for an offence punished with a maximum sentence of 3 months and a fine of Rs. 100/- under Sec. 61-E, Bombay District Police Act. In such a case it is certainly open to the Court to order the property to be delivered to the person claiming to be entitled to its possession.

Where the gold was found from the possession of the accused and the Court was not called upon to consider any rival claims about its possession and there was no evidence to prove that it was stolen or that it was fraudulently obtained, and all that was found was that that there was reason to

believe that it was stolen or fraudulently obtained and that the accused failed to account for its possession to the satisfaction of the Court, its confiscation under S. 517 upon the existence of a mere belief required to sustain a conviction under S. 61-E would be palpably harsh and unreasonable, even assuming that the gold was smuggled from Africa into India. *Suleman Issa* v. *State of Bombay*,

A I R 1954 S C 312 (314).

BOMBAY INDUSTRIAL RELATIONS ACT (XI of 1947).

(85) *S. 3 (13) & (14)—Labour employed by owner of undertaking through contractor—If "employees" under the Act.*

Where the contractors engaged by a company were under the responsibility of employing responsible servants (as the company may approve of) for carrying on the operation entrusted to them and those servants or coolies were to be paid wages by the contractor and if thought necessary by the company directly and the contract labour got the same amenities from the company as the muster roll labour the persons employed by the contractor were 'employees' within the meaning of the Act: A. I. R. (38) 1951 Bom. 68, *Affirmed. Maharashtra Sugar Mills* v. *State of Bombay*,

A I R 1951 S C 313
=1951 S C J 472.

BOMBAY LAND REQUISITION ORDINANCE (V of 1947).

(86) *S. 3 —Provincial Government—Writ of certiorari, if lies against—Constitution of India, Arts. 139 and 226—Government of India Act (1935), Ss. 176 and 306 (1).*

Per *Mahajan and Mukherjea JJ.*—A writ of *certiorari* falls within the expression "sue" used in S. 176 of the Government of India Act and the remedy therefore is within the express terms of the statute. Further, immunity from suits given by S. 306 (1) of the Government of India Act is given to the Governor and not the Provincial Government, though the Governor may be one of the component parts of the Provincial Government. A writ of *certiorari*, therefore, lies against the Provincial

Government in respect of its decision under S. 3 of the Ordinance. *Province of Bombay* v. *Khushaldas*.

A I R 1950 S C 222
=1950 S C J 451
=1950 S C R 621.

(87) *Ss. 10 (1) and 12—"May"—If can be construed as "must".*

Per *Das J.*—In construing a power, the Court will read the word 'may' as "must" when the exercise of the power will be in furtherance of the interest of a third person for securing which the power was given. Enabling words are always potential and never in themselves significant of any obligation. They are read as compulsory where they are words to effectuate a legal right. In Ss. 10 *(1)* and 12 the power was given to enable the Provincial Government to obtain information to carry out the purposes of the Ordinance. It was not given for the benefit of any other person including the owner of the land sought to be requisitioned. The word "may" occurring in these sections cannot, therefore, be construed as "must". *Province of Bombay* v. *Khushaldas*,

A I R 1950 S C 222=1950 S C J 45
=1950 S C R 621.

BOMBAY LAND REVENUE CODE (V of 1879).

(88) *S. 214 — Rules under, R. 92—"Otherwise directed by Government."*

Rule 92 in imperative terms directs the Collector to alter the assessment in case agricultural lands are converted to non-agricultural use. The Collector has no option in the matter and as soon as an application is made to him he should proceed to make an assessment and levy it on the non-agricultural lands. When the Collector declines to accede to the request of the applicant he clearly acts in contravention of the clear provisions of the rule if at that time, no "directions to the contrary" have been given to him by the Government. When Government has been given the power to give directions to the Collector not to act in accordance with the imperative provisions of a rule which enjoin upon him to make the altered assessment. that power has to be exercised in clear and unambiguous terms as it affects civil rights of the persons concerned and the decision that the power has

Bombay Prohibition Act, 1949

been exercised should be notified in the usual manner in which such decisions are known to the public. Dismissal by the Government of the applicant's appeal and affirmation by it of an erroneous order of the Collector could not be held to amount to action under the provisions of R. 92. *Fatma Haji Ali* v. *State of Bombay*,

A I R 1951 S C 180 =1951 S C J 247=1951 S C R 266.

BOMBAY PROHIBITION ACT(XXV of 1949)

(89) *Preamble—Validity of Act — Certain provisions of Act declared invalid — Rest of Act declared valid.*

The following provisions of the Bombay Prohibition Act, 1949, are invalid :

(1) Cl. (c) of S. 12, so far as it affects the possession of liquid medicinal and toilet preparations containing alcohol.

(2) Cl. (d) of S. 12, so far as it affects the selling or buying of such medicinal and toilet preparations containing alcohol.

(3) Cl. (b) of S. 13, so far as it affects the consumption or use of such medicinal and toilet preparations containing alcohol.

(4) Cl. (a) of S. 23, so far as it prohibits the commendation of any intoxicant or hemp.

(5) Cl. (b) of S. 23 in entirety.

(6) Cl. (a) of Sub-s. *(1)* of S. 24, so far as it prohibits commendation of any intoxicant or hemp.

(7) Sub-s. *(1)* of S. 136, in entirety.

(8) Cls. (b), (c), (e) and (f) of Sub-s. *(2)* of S. 136, in their entirety.

The rest of the provisions of the Act are valid. The declaration that some of the provisions of the Act are invalid does not affect the validity of the Act as it remains. A I R (38) 1951 Bom 210 (FB), *Affirmed.*

(*Note :* Reversing the decision of the Bombay High Court, the Supreme Court has declared 'valid' the following sections. Rule and Notifications, namely, Ss. 2 (24), 24 (1) (b), 39, 52, 53, 139 (c), Rule 67 of the Bombay Foreign Liquor Rules framed under S. 143, and notifications Nos. 10484/45 (c) and 2843/49 (a) dated 30-3-1950. To this extent the decision in A I R (38) 1951 Bom 210 (FB) *is reversed. The State of Bombay* v. *F. N. Balsara*,

A I R 1951 S C 318 =1951 S C J 478=1951 S C R 682.

(90) *Ss. 2 (22) and 66 (b) —Possession of prohibited article.*

Bombay Prohibition Act (1949)

Where the rectified spirit found in possession of the accused was 94 v/v of ethyl alcohol it fell within the definition of intoxicant as given in S. 2 (22), possession of which, without permit, is prohibited by S. 66 (b). *Vijendrajit* v. *State of Bombay*, **A I R 1953 S C 247.**

(91) *S. 39— S. 39 whether contravenes Constitution of India, Art. 14.*

There is nothing wrong 'prima facie' in the legislature according special treatment to persons of the armed forces who form a class by themselves in many respects and who have been treated as such in various enactments and statutory provisions. Hence, S. 39, in so far as it affects the military and naval messes and canteens, war ships and troopships, cannot be held to be invalid, on the ground that it contravenes Art. 14 of the Constitution : A I R (38) 1951 Bom 210 (FB), REVERSED. *The State of Bombay* v. *F. N. Balsara*,

A I R 1951 S C 318 =1951 S C J 478=1951 S C R 682.

(92) S. 40—Word "addict" in medical certificate required under rules framed should be replaced by words used in S. 40 *(1)* (b) or words corresponding to them. *The State of Bombay* v. *F. N. Balsara*,

A I R 1951 S C 318 =1951 S C J 478=1951 S C R 682.

(93) *Ss. 66 (b) and 2 (22) — Offence under.*

Where the rectified spirit found in possession of the accused was 94 v/v of ethyl alcohol it fell within the definition of intoxicant as given in S. 2 *(22)*, possession of which, without permit, is prohibited by S. 66 (b). *Vijendrajit Ayodhya Prasad Goel* v. *State of Bombay*,

A I R 1953 S C 247 (248).

(94) *Ss. 81 and 66 (b) — Possession of article.*

Where all that was suggested by the defence was that the articles found in the godowns were planted there by the police but it was not said that the godown was accessible to all and the police might have kept the spirit there and the suggestion could not bear examination in view of the evidence, the Magistrate was justified in those circumstances in drawing the inference that these articles were in possession of the accused who was in possession of the godown and the Supreme Court would not disturb

the decision. *Vijendrajit Ayodhya Prasad Goel* v. *State of Bombay*,

A I R 1953 S C 247 (248).

BOMBAY PUBLIC SECURITY MEASURES ACT (VI of 1947).

(95) S. 12 — Procedure under — Discriminatory and hence ultra vires of Art. 14, Constitution of India. *Lachmandas* v. *State of Bombay*, *See also* Constitution of India, Art. 14.

A I R 1952 S C 225 =1952 S C J 339=1952 S C R 710.

BOMBAY PUBLIC TRUSTS ACT (XXIX of 1950).

(96) *S. 1.—Validity of certain provisions of the Act.*

The following povisions of Bombay Public Trusts Act are invalid, to wit : (i) S. 44 of the Act to the extent that it relates to the appointment of the Charity Commissioner as a trustee of religious public trust by the Court; (ii) the provisions of Clauses (3) to (6) of S. 47, and (iii) Clause (c) of S. 55 and the part of Clause (1) of S. 56 corresponding thereto : Ss. 18, 31 to 37, 48, 50 Cls. (e) and (g), 58 and 66 of the Act held valid. *Ratilal Panachand Gandhi* v. *State of Bombay*

A I R 1954 S C 388 (396).

(97) *S. 58 — Validity.*

Section 58 of the Bombay Public Trusts Act, 1950 is not 'ultra vires' of the State Legislature by reason of the fact that it is not a tax but a fee which comes within the purview of Entry 47 of List III in Schedule VII of the Constitution. *Ratilal Panachand Gandhi* v. *State of Bombay*,

A I R 1954 S C 388 (396).

BOMBAY RENTS, HOTEL AND LODGING HOUSE RATES CONTROL ACT (LVII of 1947).

(98) *S. 4—Bombay Housing Board Act (69 of 1948) (as amended by Act 11 of 1951), S. 3-A — Sections do not contravene Constitution of India, Art. 14.*

As the Co-operative Housing Societies or their members do not stand similarly situated vis-a-vis the Bombay Housing Board and its tenants, S. 3-A of the Bombay Housing Board Act, 1948, which exempts lands or buildings belonging to or vested in the Bombay Housing Board from the operation of the Bombay Rents, Hotel and Lodging House Rates Control Act does not

offend against the equal protection clause of the Constitution.

Exemption is given by Section 4, Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 to certain classes of tenants. This classification is based on an intelligible differentia which distinguishes them from other tenants and this differentia has a rational relation to the object sought to be achieved by the Act.

Hence, neither Section 4 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, nor Section 3-A of the Bombay Housing Board Act, 1948, can be challenged as unconstitutional on the ground of contravention of Article 14 of the Constitution. *Baburao Shantaram More* v. *Bombay Housing Board*,

A I R 1954 S C 153.

(99) *Ss. 4 and 28—Premises belonging to Government or a local authority—Act does not apply even as between lessee of such premises and his sub-tenant — "Belonging to" — Meaning of — (T. P. Act (1882), Ss. 105, 108).*

The first part of S. 4 *(1)* provides that the Act shall not apply to any premises belonging to Government or a local authority. The Legislature did not by the first part intend to exempt the relationship of landlord and tenant but intended to confer on the premises itself an immunity from the operation of the Act.

It is not correct to say that the immunity given by the first part should be held to be available only to the Government or a local authority to which the premises belongs. If that were the intention, then the Legislature would have used phraseology similar to what it did in the second part, namely, it would have expressly made the Act inapplicable "as against the Government or a local authority." This it did not do and the only inference that can be drawn from this circumstance is that this departure was made deliberately with a view to exempt the premises itself. Therefore, the first part of the section should be so construed as to exempt the premises from the operation of the Act, not only as between the Government or a local authority on the one hand and its lessee on the other, but also as between that lessee and his sub-tenant.

A plot of land belonging to the Board of Trustees for the improvement of City of

Bombay Rents, Hotel and Lodging House Rates Control Act (1947)

Bombay was put to auction on certain terms and conditions for the purpose of granting a building lease. One *S* who was the highest bidder signed the memorandum of agreement incorporating the conditions upon which the auction was held. By cl. 7 of these conditions, *S* agreed, within the time specified therein to build and complete at his own cost of not less than Rs. 50,000 a building of particular specification. Clause 18 of the conditions provided that immediately after the completion of the building within the time specified the Trustees shall grant to *S* or his nominee a lease of the said plot with buildings thereon for the term of 999 years from the date of the auction at a yearly rent calculated in accordance with the accepted bidding for the plot. The Trustees, pursuant to the said agreement and in consideration of the monies which had been expended in the erection of the buildings and of the rent and the covenants thereinafter reserved and contained, (see para. 3 of the judgment) demised unto the lessee all that piece of land together with the buildings erected thereon to hold the same for 999 years. In 1948 the successor-in-interest of *S* brought a suit in the City Civil Court for ejectment against the defendant who was a sub-tenant of one of the blocks in the demised premises, after giving a notice to quit. The sub-tenant claimed protection under Bombay Act 57 of 1947 and that under S. 28 of that Act the Court had no jurisdiction to entertain the suit :

Held in the facts and circumstances, the demised premises including the building belonged to the Board which was a local authority and therefore were outside the operation of the Act in view of S. 4 (1). The fact that the lessee incurred expenses in putting up the building was precisely the consideration for the lessor granting him a lease for 999 years not only of the building but of the land as well at what may be a cheap rent which the lessor may not have otherwise agreed to do. By the agreement the building became part of the land and the property of the lessor and the lessee took a lease on that footing. The lessee or a person claiming title through him could not now be heard to say that the building did not belong to the lessor. Forfeiture does not, for the first time, give title to the lessor.

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On forfeiture he re-enters upon what has all along been his own property. The interest of the lessor in the demised premises could not possibly be described as a contingent interest which would become vested on the expiry or sooner determination of the lease. The City Civil Court had, therefore, jurisdiction to entertain the suit. *Messrs. Bhutia Co-operative Housing Society Ltd.* v. *D. C. Patel*, **A I R 1953 S C 16.**

(100) *Ss. 12 and 50—Retrospective operation.*

The provisions of Act LVII [57] of 1947 have no application to appeals pending at the time when that Act came into force. In terms the provisions of the new Act and the rules made thereunder are made to apply only to such suits and proceedings which are transferred under the provisions of S. 50 and its retrospective effect is confined to what is expressly stated in S. 50. The Act was given retrospective operation only to a limitted extent and execution proceedings and appeals were excluded from this effect and were to be governed by the provisions of the law in force at the time when the decrees were passed.

Section 50 cannot be described as a section providing merely for transfer of pending cases to Courts having jurisdiction to deal with them. It is on the other hand a "repeal" section in the new statute.

Section 12 is in terms prospective and not retrospective. It cannot apply to suits which were already pending when the Act was put on the statute book: A. I. R. (36) 1949 Bom. 210 (F.B.), *Approved. Chandrasinh Manibhai* v. *Surjit Lal Ladhamal Chhabda*, **A I R 1951 S C 199 =1951 S C J 265=1951 S C R 221.**

(101) *S. 18 (1)—Construction of—(Interpretation of Statutes — Penal Statutes) —(Civil P. C. (1908), Pre.)*

The provisions of S. 18 *(1)* of Bombay Act 57 of 1947 are penal in nature and it is a well settled rule of construction of penal statutes that if two possible and reasonable constructions can be put upon a penal provision, the Court must lean towards that construction which exempts the subject from penalty rather than the one which imposes penalty. It is not competent to the Court to stretch the meaning of an expression used by the Legislature in order to carry out the intention of the Legislature (1946)

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A C 278, *Rel. on. Tola Ram Relu Mal* v. *State of Bombay*,

A I R 1954 S C 496.

(102) *S. 18 (1)—'In respect of'—Meaning — Premium in respect of house under construction—(Words and Phrases).*

Giving the words "in respect of" in S. 18 *(1)* their widest meaning, viz., 'relating to' or 'with reference to' it is plain that the relationship of lessor and lessee must be predicated of the grant, renewal or continuance of a lease, and unless a lease comes into existence simultaneously or nearabout of time that the money is received, it cannot be said that the receipt was "in respect of" the grant of a lease.

Thus the language of the section "in respect of the grant, renewal or continuance of a lease" envisages the existence of a lease and the payment of an amount in respect of that lease or with reference to that lease. Without the existence of a lease there can be no reference to it. If the Legislature intended to punish persons receiving pugree on merely executory contracts it should have made its intention clear by use of clear and unambiguous language.

Where, therefore, *A*, as owner of an incomplete building accepts certain amount from *B* in respect of an oral agreement between them that *A* would be bound to give and *B* would be entitled to take possession of a specified plot in the building on its completion on the rent agreed between them, the oral executory agreement of lease is outside the mischief of S. 18 *(1)* and the receipt of money by *A* from *B* is not punishable under it.

Held, further that the language of S. 18 *(3)* is not of much assistance in construing the provisions of S. 18 *(1)* : A I R 1953 Bom 347 (FB), REVERSED. *Tola Ram Relu Mal* v. *State of Bombay*,

A I R 1954 S C 496.

(103) *S. 19 (1) — Relinquishment and assignment of tenancy — Distinction — Transfer of Property Act (1882), S. 108(j).*

The distinction between an assignment on the one hand and relinquishment or surrender on the other is too plain to be ignored. In the case of an assignment, the assignor continues to be liable to the landlord for the performance of his obligations

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under the tenancy and this liability is contractual while the assignee becomes liable by reason of privity of estate. The consent of the landlord to an assignment is not necessary, in the absence of a contract or local usage to the contrary. But in the case of relinquishment, it cannot be a unilateral transaction; it can only be in favour of the lessor by mutual agreement between them. The relinquishment of possession must be to the lessor or one who holds his interest. In fact, a surrender or relinquishment terminates the lessee's rights and lets in the lessor. *W. H. King* v. *Republic of India*,

A I R 1952 S C 156 =1952 S C R 418=1952 S C J 133.

(104) *Ss. 19 (2), 15—Relinquishment of tenancy — Meaning — Held, transaction amounted to assignment — Conviction set aside—(Interpretation of Statutes.)*

As the statute creates an offence and imposes a penalty of fine and imprisonment, the words of the section must be strictly construed in favour of the subject. The Court is not concerned so much with what might possibly have been intended as with what has been actually said in and by the language employed.

A received Rs. 29,000 from *B* and in return handed over the vacant possession of his flat to *B* under a written document which stated : "I hereby hand over vacant possession of my flat no . . . etc., to Mr . . . from this day onward and that I have no claim whatsoever over this flat and Mr. . . . will pay the rent directly to the landlord." On being prosecuted under S. 19 *(2)* of the Bombay Act :

Held, that the document did not evidence any 'relinquishment of tenancy of the premises' within S. 19 *(1)* of the Act and hence could not be convicted under sub-s. *(2)*.

Further that the transaction merely amounted to an assignment of tenancy which, though declared unlawful under S. 15 was not made an offence by the Act. *W. H. King* v. *Republic of India*,

A I R 1952 S C 156 Supra.

(105) *S. 28 — Jurisdiction of Small Cause Court — (Civil P. C. (1908), O. 1 R. 10.)*

Where a landlord brings a suit for possession and rent against his tenant after

Bombay Revenue Jurisdiction Act (1876)

giving a notice to quit and also impleads therein a sub-tenant to whom the premises were illegally sub-let by the tenant the suit would nevertheless be one between a landlord and tenant within the meaning of S. 28 and the Small Cause Court would have jurisdiction to entertain the suit. The sub-tenant though not a necessary party to the suit is a proper party and his joinder cannot alter the nature of the suit.

"Any claim or question" in S. 28 need not necessarily be one between a landlord and a tenant. In any case, once there is a suit between a landlord and a tenant relating to the recovery of rent or possession of the premises the Small Cause Court acquires the jurisdiction not only to entertain that suit but also "to deal with any claim or question arising out of the Act or any of its provisions" which may properly be raised in such a suit. *Messrs Importers and Manufacturers* v. *Pheroze Framroze Tarapore-wala* **A I R 1953 S C 73= 1953 S C R 226=1953 S C J 82.**

BOMBAY REVENUE JURISDICTION ACT (10 of 1876)

(106) *S. 4—Applicability.*

Section 4 is attracted even if only relief sought against Government is declaration: A.I.R. 1945 Bom. 310, *Approved*; I. L. R. (1948) Bom. 809 : A. I. R. 1949 Bom. 207 OVERRULED. *Bhujangrao* v. *Malojirao* **A I R 1952 S C 138.**

(107) *S. 4 (a) — Claim against Crown relating to lands held as Saranjam—Claim against Government and others—Separate consideration of reliefs claimed against latter.*

The common ancestor of the plaintiff and defendants 1 and 2 who belonged to three different branches of the family was a British Grantee of a Saranjam estate. As a result of partition each branch was in the enjoyment of a separate share of the estate. On the death of the plaintiff's father the Governor-in-Council directed by a resolution passed in 1932 that the Saranjam should be formally resumed and regranted to the plaintiff and that it should be entered in his sole name in the accounts of the Collector. However in 1936 the Governor-in-Council passed another resolution in modification of the previous one directing that the estate held by the plaintiff and defendants 1 and 2

Bombay Shops and Establishments Act (1948)

should be entered in the Revenue Records as *de facto* shares in the estate held by them as representatives of three branches of the family. The plaintiff thereupon brought a suit against defendants 1 and 2 and the State of Bombay attacking the resolution of 1936 as *ultra vires* and praying *inter alia* for declarations that defendants 1 and 2 had no right to go behind the order of the Government as per resolution of 1932 under which he was entitled to be recognised as the sole Saranjamdar and that the Government had no right to change the resolution of 1932 and at any rate during the lifetime of the plaintiff : *Held* (1) that the suit was a suit against the Crown relating to lands held as Saranjam and, therefore, the jurisdiction of the Civil Court was barred;

(2) that this was not a suit in which the rights claimed against defendants 1 and 2 could be divorced from the claim against the Government and, therefore the claim against the Government could not be dismissed and the plaintiff given reliefs against the other two defendants: A. I. R. 1926 Bom. 417 and A. I. R. 1931 Bom. 47 (1) *Approved;*

(3) that the Court had no jurisdiction to decide whether the Government acted in excess of its powers. A. I. R. 1947 P. C. 200 *Disting, Bhujangrao* v. *Malojirao,* **A I R 1952 S C 138.**

BOMBAY SALES TAX ACT, 1952,

See Sales Tax.

BOMBAY SHOPS AND ESTABLISHMENTS ACT (79 of 1948)

(108) *S. 2 (27) — Shop — Meaning — 'Such trade or business' relates to earlier part of definition — Workshop engaging only three persons—No selling on premises — Not a shop—(Words and Phrases) (Interpretation of Statutes).*

The trade or business contemplated by the main portion of the definition of 'shop' in S. 2 (27) is not any business of selling wherever and however conducted but only those trades where the selling is conducted on defined premises. The very idea of a shop in that connotation betokens a room or a place or a building where goods are sold. The rest of the definition merely links on the main definition ancillary places, such as store, roofs, godowns, work places, etc., which are mainly used in connection with the business; and "business" means the kind of business defined in the earlier part of the

Business Profits Tax Act (1947)

definition, namely, that portion of the business of selling which is confined to selling on some defined premises.

There is no justification for ignoring the limitation which the legislature has placed on the main portion of the definition and holding that "such" relates to a much wider classification of "selling" which the main portion of the definition not only does not envisage but has deliberately excluded.

A employed three workers and did business in a very small way by going to certain local mills, collecting orders from them for spare parts, manufacturing the parts so ordered in his workshop, delivering them to the mills when ready and collecting the money therefor. No buying or selling was done on the premises, and it was also admitted that no services were rendered to customers there, for the manufacture of spare parts for sale elsewhere could not be regarded as "services rendered."

Held that a concern of this nature was not a 'shop' within the meaning of S. 2 (27);

(2) that in view of the way in which S. 2 (27) was worded, the intention of the legislature appeared to exclude small concerns from the purview of the Act and that this was the interpretation which better accorded with the logical construction of the words used in the section. *Kalidas* v. *State of Bombay*,

A I R 1955 S C 62

BUSINESS PROFITS TAX ACT (1947)

(109) *Sch. 2 R. 2 (1) and S. 2 (1) — "Reserve" — Undistributed profits on crucial date — (Companies Act (1913), Ss. 131 (a) and 132 and Sch. I, Table A, Regn. 99).*

The term 'reserve' is not defined in the Act and should be given the ordinary natural meaning as understood in common parlance. The reserve may be a general reserve or a specific reserve, but there must be a clear indication to show that it was a reserve either of the one or the other kind. Profits lying unutilized and not specially set apart for any purpose on the crucial date would not constitute reserves within the meaning of Sch. II, R. 2 (1).

This conclusion as to what is the true nature of a reserve shown in a balance-sheet is supported by Ss. 131 (A), 132 and

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Regn. 99 of Sch. I, Table A of the Companies Act.

Therefore the amount of profits lying unutilized and not specially set apart for any purpose cannot be treated as a reserve and added to the paid up share capital for the purposes of computing abatement under S. 2 (1) of the Act. *Commissioner of Income-tax* v. *Century Spng. & Mfg. Co.*

A I R 1953 S C 501=1953 S C J 651=1954 S C R 203.

CALCUTTA HIGH COURT RULES

See High Court.

CENTRAL CIVIL SERVICES (TEMPORARY SERVICES) RULES, 1954

See A. I. R. 1953 S. C. 250, under Art. 311, Constitution of India.

CENTRAL EXCISES AND SALT ACT

See A. I. R. 1950 S. C. 11, under Excise.

CENTRAL PROVINCES & BERAR MUNICIPALITIES ACT, 1922

See under Municipal Acts.

CENTRAL PROVINCES & BERAR REGULATION OF MANUFACTURE OF BIDI (AGRICULTURAL REFORMS) ACT, 1948

See Constitution of India, Art. 19. A. I. R. 1951 S. C. 118.

CENTRAL PROVINCES & BERAR SALES TAX ACT, 1947

See Sales Tax.

CERTIORARI

See Constitution of India, Arts. 32 & 226.

CITY OF BOMBAY MUNICIPAL ACT, 1888

See Municipal Acts.

CITY OF BOMBAY POLICE ACT

See under Police Acts.

CIVIL PROCEDURE CODE (V OF 1908)

See also Practice.

(110) *Preamble — Interpretation of Statutes.*

Courts are bound to construe the ambiguous words in a sense which will carry out the purpose of the Act and not in a way

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which will travel beyond it. *Biswambhar Singh and others* v. *State of Orissa and another*, A I R 1954 S C 139 (146)= 1954 S C J 219=1954 S C R 842.

(111) *S. 9 — Power of Civil Court to decide question of its own jurisdiction — Bombay Rents, Hotel and Lodging House Rates Control Act (47 of 1947), S. 28.*

A Civil Court has inherent power to decide the question of its own jurisdiction, although, as a result of its enquiry, it may turn out that it has no jurisdiction over the suit.

Thus, a City Civil Court has jurisdiction to decide whether it has jurisdiction to entertain a suit for possession of premises brought by a landlord against a tenant in view of S. 28, Bombay Rents, Hotel and Lodging House Rates Control Act. *Messrs. Bhatia Co-operative Housing Society Ltd.* v. *D. C. Patel*, A I R 1953 S C 17.

—S. 9.

See also A. I. R. 1953 S. C. 325, under Constitution of India.

A. I. R. 1954 S. C. 210.

A. I. R. 1954 S. C. 520, under "Election".

A. I. R. 1952 S. C. 245, under Hindu Law.

A. I. R. 1951 S. C. 230, under Industrial Disputes Act, infra.

(112) *Ss. 9, 21 — Decree passed without jurisdiction is nullity.*

It is a fundamental principle that a decree passed by a Court without jurisdiction is a nullity, and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction, whether it is pecuniary or territorial, or whether it is in respect of the subject-matter of the action, strikes at the very authority of the Court to pass any decree, and such a defect cannot be cured even by consent of parties. *Kiran Singh* v. *Chaman Paswan*, A I R 1954 S C 340.

—S. 11.

See also A. I. R. 1954 S. C. 340, under Suits Valuation Act.

(112A) Applicability—Competency to try — Constructive res judicata — Erroneous decision—Execution proceedings — Litigating under the same title.

(113) *S. 11 — Applicability — Consent decree in partition suit — O. 2, R. 2, Civil P. C.*

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A joint family consisting of six brothers carried on various businesses and possessed movable and immovable properties. The plaintiff, the eldest brother, carried on liquor shop business; defendants 1 and 2 carried on motor bus service business and defendant 4 was carrying on grocery shop business. On 29th June 1945, all the five brothers filed a suit against the plaintiff for partition of all joint family properties and taking of accounts of all the businesses. It was compromised on 7th March 1946. By this compromise it was declared that prior to 1942 all the accounts of the various businesses had been correctly maintained and shown, that the parties had agreed to have arbitrators appointed through Court for examining the accounts from 1942 up to 31st March 1946, upon examination of accounts by the arbitrators. All the moveable property of the joint family including the stock in trade of all the family businesses was to be divided equally among all the brothers. The compromise further declared that the plaintiff was to have one-sixth share in the motor garage and that defendants 1 and 2 were to pay the price of one-sixth share to him. These were the material provisions of the compromise. One of the brothers was a minor and the Court finding the compromise to be for the benefit of the minor accepted it and passed a preliminary decree in terms of the compromise on 25th July 1947. The plaintiff, however, commenced a fresh suit on 23rd February 1949, confining his relief to his share of the profits and assets of the motor business carried on by defendants 1 and 2 after 31st March 1946. His case was that the compromise was made in a hurry that the parties omitted to provide in the compromise about the future conduct of the motor business from 1st April 1946, that the motor business was still a joint family business and that he had a right to ask for accounts of that business subsequent to 31st March 1946. It was found as a fact that the compromise was arrived at after full consideration by the parties and was not vitiated by fraud, misrepresentation, mistake or misunderstanding.

Held, (i) that the compromise closed once for all the controversy about taking any account of the joint family businesses including the motor business after the 31st March 1946, and the plaintiff was bound by

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the terms of the compromise and the consent decree following upon it.

(ii) A consent decree is as binding upon the parties thereto as a decree passed by invitum. The compromise having been found not to be vitiated by fraud, misrepresentation, misunderstanding or mistake, the decree passed thereon had the binding force of *res judicata* and the plaintiff was barred from reagitating the question of accounts in a fresh suit.

(iii) The cause of action in the first suit was the desire of the plaintiff to separate from his brothers and to divide the joint family property. That suit embraced the entire property without any reservation and was compromised, the plaintiff having abandoned his claim to account in respect of the motor business subsequent to 31st March 1946. His subsequent suit to enforce a part of the claim was founded on the same cause of action which he deliberately relinquished. The cause of action in the two suits being the same, the suit was barred under Order 2, Rule 2 (3) of the Civil Procedure Code. *Shankar Sitaram Sontakke and another* v. *Balkrishna Sitaram Sontakke and others*,

A I R 1954 S C 352 (354, 355).

(114) S. 11—Applicability of—Question not in issue — No issue regarding nature of tenancy in previous suit, either directly or indirectly—Decision is not *res judicata* on the question. *Bejoy Gopal* v. *Pratual Chander*, **A I R 1953 S C 153= 1953 S C J 195=1953 S C R 930.**

(115) *S. 11 —Applicability of — Two appeals in one suit—Dismissal of one—Limitation Act (1908), S. 5.*

From the decree of trial Court in favour of the plaintiff two separate appeals were taken by two sets of the defendants. The appellate Court allowed both the appeals and dismissed the plaintiff's suit by one judgment and ordered a copy of the judgment to be placed on the file of the other connected appeal. Two decrees were prepared. The plaintiffs preferred two appeals, one of the appeals was time barred and on the principle of 'res judicata' the High Court dismissed both the appeals. Held that it was not necessary to file two separate appeals separately in this case. The question of 'res judicata' arose only when there were two suits. As there was one suit and both the

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decrees were in the same case and based on the same judgment and matter decided concerned the entire suit the principle of 'res judicata' did not apply. Further, the High Court ought to have given the appellant benefit of S. 5, Limitation Act, as there was conflict of decisions regarding this question. *Narhari & others* v. *Shanker & others.*

A I R 1953 S C 419.

(116) *S. 11—Applicability—Grant of letters of administration.*

By an agreement *B* agreed to pay Rs. 50 in cash every month during the lifetime of *A* in consideration of *A* having proposed to make a bequest of a life interest to his wife and the remainder in favour of *B* and his sons. *A* executed the will accordingly, but *B* failed to make any payment. After the death of the testator the heirs of *B* were on 7-5-1937 granted by their Lordships of the Privy Council letters of administration with the will annexed. On 9-9-1937 a suit was brought by the heirs of *A* against the heirs of *B* in which it was contended that both the questions as regards *animus testandi* and the payment of Rs. 50 per month being a condition precedent though they were barred by res judicata in regard to the due execution of the will were still open to them as affecting the right of *B* to the legacy which was provided for him by *A* under the will: *Held*, that the question of *animus testandi* was barred by res judicata but in regard to the question whether the bequest in favour of *B* could take effect by reason of default in payment the decision of the Privy Council did not constitute res judicata. *Raj Rani* v. *Dwarka Nath Singh*,

A I R 1953 S C 205.

(117) *S. 11—Competency to try must have existed at the date of the former suit.*

In order to determine whether a Court which decided the former suit had jurisdiction to try the subsequent suit, regard must be had to the jurisdiction of the Court at the date of the former suit and not to its jurisdiction at the date of the subsequent suit. If at that time such a Court would have been competent to try the subsequent suit, had it been then brought the decision of such Court would operate as 'res judicata' although subsequently by a rise in the value of the property that Court had ceased to be a proper Court, so far as regards its pecu-

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niary jurisdiction to take cognizance of a suit relating to that very property.

Where, therefore, at the date of the earlier suit the property was assessed to land revenue in the sum of Rs. 84, while at the date of the later suit it was assessed in sum of Rs 104, held, that the property in dispute in the two suits was identical but the difference in the jurisdictional value had arisen by reason of the increase in the land revenue assessment. That circumstance could not affect the plea of 'res judicata' because the subsequent suit, if brought in the year in which the prior suit was brought would have been within the competence of the Munsiff who tried the first suit, since the land revenue assessed on the property then was only Rs. 84 and the valuation of the suit would have been within the Munsiff's pecuniary jurisdiction. The later suit was therefore barred by the rule of 'res judicata.' *Jeewantha* v. *Hanumantha.*

A I R 1955 S C 9.

(118) *S. 11—Competent to try—Competency must have existed at the date of the former suit.*

In order to determine whether a Court which decided the former suit had jurisdiction to try the subsequent suit, regard must be had to the jurisdiction of the Court at the date of the former suit and not to its jurisdiction at the date of the subsequent suit. If at that time such a Court would have been competent to try the subsequent suit, had it been then brought the decision of such Court would operate as 'res judicata' although subsequently by a rise in the value of the proper Court, so far as regards its pecuniary jurisdiction to take congnizance of a suit relating to that very property. Where, therefore, at the date of the earlier suit the property was assessed to land revenue in the sum of Rs. 84, while at the date of the later suit it was assessed in sum of Rs. 104. Held, that the property in dispute in the two suits was identical but the difference in the jurisdictional value had arisen by reason of the increase in the land revenue assessment.

That circumstance could not affect the plea of 'res judicata' because the subsequent suit, if brought in the year in which the prior suit was brought would have been within the competence of the Munsiff who tried the first suit, since the land revenue assessed on the property then was only

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Rs. 84 and the valuation of the suit would have been within the Munsiff's pecuniary jurisdiction. The later suit was therefore barred by the rule of 'res judicata.' *Jeevantha* v. *Hanumantha*

A I R 1954 S C 9 (10)

(119) *Ss. 11, 47 — Competency to try —Decree of lower Court compromised in appeal — Applicability of S. 47 — Limitation against reversioner — (Limitation Act (1908), Art. 144)—(Land Acquisition Act (1894), Ss. 9, 10, 18 and 30).*

One Raj Ballav died on 10-6-1870 leaving him surviving his widow Mati Dassi and three grandsons, sons, who were sons of a predeceased daughter by another wife. On Raj Ballav's death, Mati Dassi entered into possession of the estate and adopted one Jogendra Nath Seal in 1873 under the authority conferred on her. Jogendra married Katyayani, and Rajlakshmi was their only child. Mati Dassi died in 1899 and the Sens then appeared to have taken possession of the estate. On 13-1-1903, Katyayani commenced suit of 1903 against the Sens. In the plaint as originally filed, Katyayani admitted the title of the Sens to a one-fourth share of the estate and claimed only a three-fourth share for herself as the widow of Jogendra. The Sens claimed the whole estate for themselves as the heirs of Raj Ballav. During the pendency of this suit, on 25-9-1903 the Sens mortgaged the whole sixteen annas of the estate to one Das in order to secure a loan of Rs. 7,000. The trial Judge decreed the claim of Katyayani for the whole of Raj Ballav's estate and a decree for recovery of possession of the whole estate was passed in her favour. Against the decision of lower Court in this suit an appeal was taken to the District Judge. The mortgagee Shib Krishna Das was also added as a party in the appeal. The appeal was compromised and under the compromise Katyayani was to get a six anna share in absolute right in the estate, Kanai, her father, was to get another six anna share for his supposed troubles and expenses in connection with the litigation and the Sens four anna share, their share to be subject to the mortgage charge. The compromise decree was passed on 9-1-1907 and the suit was remanded to the trial Court in order that a partition might be effected and a final decree passed. A partition was made in due course and final decree was passed on

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10-9-1907. The property described as 2, Deb Lane, Calcutta, forming part of Raj Ballav's estate and which had been allotted under the compromise to the share of the Sens was notified by a declaration under the Land Acquisition Act for acquisition on 16-1-1921. On 27-4-1928 the mortgagee made an application claiming the entire amount of compensation money and contended that the mortgagee decree-holder were entitled to the whole of it. Rajlakshmi claimed the entire amount as owner of the sixteen anna share of Raj Ballav's estate. On 7-7-1928 a joint award was made in favour of all the claimants. Rajlakshmi asked for a reference to the Court on the point of apportionment of compensation by a petition made by her on 18-7-1928. She asserted that the Sens and the Dasses were not entitled to any portion of the compensation money. A special Judge was appointed under the Land Acquisition Act to try the matter. He disallowed Rajlakshmi's claim and held that the Sens were entitled to the entire compensation money. In an appeal to the Privy Council, Rajlakshmi was declared entitled to the entire compensation money. Within two months of the decision of the Privy Council, the present suit was commenced by Rajlakshmi on 21-9-1938 against the Sens and the Dasses for possession of the properties which represented the four anna share of the estate allotted to the Sens, and possession of which was delivered to them in pursuance of the terms of the final decree in the suit of 1903:

Held (1) that the mortgagees were within the definition of the phrase "person interested" under S. 10, Land Acquisition Act. In view of the provisions of Ss. 9, 10, 18 and 30 of the Act if the mortgagee actually intervenes in the land acquisition proceedings and makes a claim for the compensation and any question of title arises about the right of the mortgagor in respect of the land acquired which affects the claim for compensation, he has every right to protect that title;

(2) the claim to compensation made by the respective parties was founded on the assertion of their respective titles in that part of Raj Ballav's estate which under the partition decree of 1907 has been allotted to the Sens subject to the charge of the Dasses, and the decision on the question of apportionment depended on the determination of that title. The land acquisition Court had

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thus jurisdiction to decide the question of title of the parties in the property acquired and that title could not be decided except by deciding the controversy between the parties about the ownership of the four anna share claimed by the Sens and Rajlakshmi. The question of title to the four annas share was necessarily and substantially involved in the land acquisition proceedings and was finally decided by a Court having jurisdiction to try it and that decision thus operated as *res judicata* and estopped the Sens and the mortgagees from reagitating that matter in this suit;

(3) the test of *res judicata* is the identity of title in the two litigations and not the identity of the actual property involved in the two cases. It could not be said that the judgment of the Privy Council could not operate as *res judicata* against the present contention of the Sens and the mortgagees, about the title to the four anna share of Raj Ballav's Estate, because the subject matter of those proceedings was the compensation money and not the property that was the subject-matter of the present suit;

(4) the condition regarding the competency of the former Court to try the subsequent suit is one of the limitations engrafted on the general rule of *res judicata* by S. 11 of the Code and has application to suits alone. When a plea of *res judicata* is founded on general principles of law, all that is necessary to establish is that the Court that heard and decided the former case was a Court of competent jurisdiction. It does not seem necessary in such cases to further prove that it has jurisdiction to hear the latter suit. A plea of *res judicata* on general principles can be successfully taken in respect of judgments of Courts of exclusive jurisdiction, like revenue Courts, land acquisition Courts, administration Courts, etc. These Courts are not entitled to try a regular suit and they only exercise special jurisdiction conferred on them by the statute. It could not be held that the Judge who decided the apportionment issue in the land acqusition proceedings of 1928 was a special Judge appointed under the Land Acquisition Act and not being a District Judge, the special Judge had no jurisdiction to hear the present suit;

(5) it could not be held that the present suit of Rajlakshmi was barred by S. 47, Civil P. C. as the decree given in suit of 1903 became unexecutable by reason of the

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compromise arrived at in appeal in that case in 1907, which compromise was given full effect by actual partition of the property;

(6) the possession of the Sens during the lifetime of Katyayani could not confer any title on them as against Rajlakshmi, the next reversioner whose title to the estate could only arise on the death of Katyayani. Rajlakshmi's suit was not barred by time: 49 I A 129 and 66 I A 145, *Rel. on*; 1939 A C 1, *Disting. Raj Lakshmi Dasi* v. *Banamali Sen*, **A I R 1953 S C 33 = 1953 S C R 154 = 1952 S C J 618.**

(120) S. 11—Constructive res judicata—Court holding in previous litigation that party was entitled to claim benefit of provisions of Act — Decision does not amount to hold that interpretation sought to be put by him on particular section of that Act is right one — No constructive res judicata. *Ramnandan* v. *Kapaldeo*.

A I R 1951 S C 155= 1951 S C J 199=1951 S C R 138.

(121) *S. 11—Erroneous decision.*

Per *Ghulam Hasan J.* — Even an erroneous decision on a question of law operates as 'res judicata' between the parties to it. The correctness or otherwise of a judicial decision has no bearing upon the question whether or not it operates as 'res judicata'. A decision in the previous execution case between the parties that the matter was not within the competence of the executing Court even though erroneous is binding on the parties. A I R 1943 Cal 460, *Rel. on.*; 9 All 191 (P C); 36 Cal 193; 38 Cal 639 & A I R 1930 All 681, *Disting.*; A I R 1931 All 454, held not correctly decided; A I R 1950 Cal 237, REVERSED, *Mohan Lal Goenka* v. *Benoy Kishana*.

A I R 1953 S C 65= 1953 S C R 377=1953 S C J 130.

(122) *S. 11—Execution.*

Per *Ghulam Hasan J.* — That the principle of constructive 'res judicata' is applicable to execution proceedings is no longer open to doubt. A I R 1934 Cal 472 and A I R 1938 Pat 427, *Rel. on.*; *Case law referred.*

Thus where neither at the time when the execution application was made and a notice served upon the judgment-debtor, nor in the applications for setting aside the two sales made by him does the judgment-debtor raise any objection to execution being proceeded with on the

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ground that the execution Court had no jurisdiction to execute the decree, the failure to raise such an objection which goes to the root of the matter precludes him from raising the plea of jurisdiction on the principle of constructive 'res judicata' after the property has been sold to the auction-purchaser who has entered into possession. *Mohan Lal Goenka* v. *Benoy Kishana*, **A I R 1953 S C 65= 1953 S C R 377=1953 S C J 130.**

(123) *S. 11 — Litigating under same title—Right claimed in both suits same.*

Where right claimed in both suits is the same, the subsequent suit would be barred as res judicata though the right in the subsequent suit is sought to be established on a ground different from that in the former suit. It would be only in those cases where the rights claimed in the two suits were different that the subsequent suit would not be barred as res judicata even though the property was identical. *Sunderabai* v. *Devaji Shankar Deshpande*, **A I R 1954 S C 82 (84).**

(124) *S. 11—Litigating under the same title — Compromise decree and estoppel—(Evidence Act, S. 115) — Hindu Law — Adoption.*

G having adopted the plaintiff as a son to her deceased husband, disputes arose between her and the defendant, her mother-in-law, regarding the validity of the adoption. The arbitrator to whom the disputes were referred declared that the plaintiff's adpotion was invalid, that the right of adoption was lost to *G* from the very beginning and that nevertheless, with the object of obtaining peace and goodwill the defendant should pay Rs. 8,000 to the plaintiff. A decree in terms of the award was obtained, the plaintiff having admitted the terms thereof and the receipt of Rs. 8,000. Subsequently *G* again adopted the plaintiff: *Held*, that though the plaintiff was litigating under the same title, the bar of res judicata would not apply as the previous decree was passed in terms of the compromise, but that the underlying principle of estoppel was applicable and the plaintiff was estopped from contending that *G* had the right to adopt him, even if the matter had passed from the stage of mere representation into an agreement. *Sunderabai* v. *Devaji Shankar Deshpande*,

A I R 1954 S C 82 (84 & 85).

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(125) *S. 34—Future interest.*

Decree against defendant — Defendant depositing amount in Court with prayer that money should not be paid out to creditors of plaintiff insolvent's estate during pendency of appeal — *Held* Official Assignee decree-holder having taken money and kept it, future interest could not be allowed for the period. *Trojan & Co.* v. *Nagappa*,

A I R 1953 S C 235=1953 S C R 789=1953 S C J 345.

(126) S. 35—Costs — Supreme Court—Suit against Government decreed by lower Courts—Government appealing to Supreme Court — Brunt of fight borne by the petty respondent in Supreme Court—Government ordered to bear its own costs. *The Dominion of India (Now the Union of India)* v. *Shrinbhai A. Irani.*

A I R 1954 S C 596 (600)=1954 S C J 813.

(127) *S. 38—Powers of executing Court.*

The duty of an executing Court is to give effect to the terms of the decree. It has no power to go beyond its terms. Though it has power to interpret the decree, it cannot make a new decree for the parties under the guise of interpretation. *V. Ramaswami* v. *Kailasa Thewar*,

A I R 1951 S C 189=1951 S C J 278=1951 S C R 292.

(128) *S. 39 — Transfer of decree for execution.*

Per *Das J.* — The Civil Procedure Code does not prescribe any particular form for an application for transmission of a decree under S. 39. Under sub-section of that section the Court can even *suo motu* send the decree for execution to another Court.

(Decree passed by High Court, Original Side—Order on decree-holder's application for Master's summons praying *inter alia* for leave to the transferee Court to sell property, when communicated to that Court, held amounted in substance to an order for transmission of decree under S. 39). *Mohan Lal* v. *Benoy Krishna*,

A I R 1953 S C 65=1953 S C R 377=1953 S C J 130.

(129) *Ss. 47, 104, 105, 115, 151 and O. 43, R. 1 — Execution — Decree-holder applying for adjournment to take necessary steps—Court refusing to adjourn and dismissing execution by same order—Subsequent order under S. 151 restoring execution case—Propriety of — Order is neither appealable nor revisable.*

On the adjourned date of hearing of an execution, the decree-holder again applied for time for giving instructions to his pleader for taking necessary steps in execution but the application for time was refused by the Court and the execution case was dismissed on part satisfaction by the very same order without formally calling for the execution case and without intimating the decision of the adjournment application to the decree-holder's pleader in order to enable him to take the necessary steps. The decree-holder then applied under S. 151, Civil P. C., for restoration of the case and the Court thereupon restored the execution case under its inherent powers in order to rectify the said mistake it had committed in dismissing the execution case by the same order without giving opportunity to the decree-holder to take the necessary steps. On revision the High Court set aside the order of restoration and remanded the case to the executing Court for reconsideration and disposal in accordance with the observations made in its order. The High Court was of the opinion that the executing Court was in error in restoring the case without taking into consideration the point whether the decree-holder's pleader could really take any steps in aid of executions if he had been apprised of the order of the Court dismissing the adjournment application. The question was whether the order of remand was without jurisdiction and all the proceedings taken subsequent to the order of the executing Court reviving the execution were void : *Held*, that (i) in the circumstances of the case the order dismissing the execution on part satisfaction was bad and the executing Court was justified in correcting the same under its inherent powers.

(ii) the order of restoration of the execution case passed under S. 151, by the executing Court did not come within the purview of S. 47, Civil P. C., and as such was not appealable. The proceedings that commenced with the decree-holder's application for restoration of the execution and terminated with the order of revival could in no sense be said to relate to the determination of any question concerning the execution, discharge or satisfaction of the decree. Such proceedings were

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in their nature collateral to the execution and were independent of it. AIR 1933 Mad 399; A I R 1943 Oudh 35, *Disting.*

(iii) An order under S. 151 simpliciter is not appealable. Under the Code of Civil Procedure, certain specific orders mentioned in S. 104 and O. 43, R. 1 only are appealable and no appeal lies from any other orders (vide S. 105, Civil P. C.). An order made under S. 151 is not included in the category of appealable orders.

(iv) In reversing the order of the executing Court reviving the execution, the High Court exercised a jurisdiction not conferred on it by S. 115. The High Court therefore acted in excess of its jurisdiction when it entertained a revision against the order of the executing Court and set it aside in exercise of that jurisdiction and remanded the case for further inquiry. Chitaley and Rao's Civil P. C. Vol. 1 (4th Edn.), *Ref.*; *Case law referred. Keshardeo Chamaria* v. *Radha Kishen Chamaria*,

A I R 1953 S C 23.

—S. 47.

See also A I R 1953 S C 514 under O. 21, R. 35 and A I R 1952 S C 170 under Hindu Law.

(130) *Ss. 47 and 96 and O. 21, R. 11— Mortgaged decree reopened under S. 36 — Bengal Money Lenders Act—Property restored to mortgagor—Application for re-restoration—If for execution.*

Mortgage decree reopened under S. 36, Bengal Money Lenders Act — New decree passed for certain sum of money—Provision for payment by instalments with default clause — Properties purchased by decree-holder restored to judgment-debtor — Properties to be re-restored in case of default— Default made—Application for re-restoration — Application is for execution though not couched in proper form — Order on such application is appealable. *Sm. Ashalata Debi* v. *Sri Jadu Nath Roy*,

A I R 1954 S C 409 (411).

(131) *S. 48—Date of decree—Plaintiff ordered to pay deficit court-fee — Decree not conditional or non-executable.*

Where a decree provides that the decree-holder should pay the deficit court-fee on the decretal amount before its execution the decree is not a conditional one in the sense that some extraneous event is to happen on the fulfilment of which alone it can be executed. The payment of court-fees on the

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amount found due is entirely in the power of the decree-holder and there is nothing to prevent him from paying it then and there. Thus it is a decree capable of execution from the very date it is passed. *Yeshwant* v. *Walchand*, **A I R 1951 S C 16= 1951 S C J 19=1951 S C R 852.**

(132) *S. 48 — Fraud—Whether should actually prevent execution* (Quære).

(Quære) — Whether the fraud of the judgment-debtor should actually prevent the execution of the decree or whether it is enough if the fraud has been committed without resulting in actual prevention. *Yeshwant* v. *Walchand*,

A I R 1951 S C 16=1951 S C J 19= 1951 S C R 852.

(133) *S. 48 (2) — Fraud—Proof of — Property purchased benami by judgment-debtor—Conduct when becomes fraudulent.*

Fraudulent motive or design is not capable of direct proof in most cases; it can only be inferred. In the very nature of things, fraud is secret in its origin or inception and in the means adopted for its success. Each circumstance by itself may not mean much, but taking all of them together, they may reveal a fraudulent or dishonest plan.

Though benami transactions are common in this country and there is nothing *per se* wrong in a judgment-debtor purchasing property in another man's name, the Court has to take into account all the circumstances attending the purchase and his subsequent conduct for finding out whether it was part of a fraudulent scheme on his part to prevent the judgment-creditor from realizing the fruits of his decree by proceeding against that property. Thus, where a judgment-debtor purchased a newspaper, but showed other persons as its publisher, printer and proprietor, while all the time operating on their accounts for his own benefit and in an insolvency proceeding against him, concealed the fact of ownership of the newspaper and pretended that his income was mainly from his family lands : *Held*, that his conduct was fraudulent within S. 48 (2), Civil P. C. *Yeshwant* v. *Walchand*, **A I R 1951 S C 16= 1951 S C J 19=1951 S C R 852.**

(134) *S. 48 (2)—Limitation Act (1908), S. 18, Arts. 181 and 182 — Scope of — Nature of fraud—Fraud under S. 48 (2) whether effective under S. 18, Limitation Act.*

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It is true that Arts. 181 and 182, Limitation Act and S. 48, Civil P. C., should be read together. The Articles expressly refer to the section. But they are independent or parallel provisions, different in their scope and object. Section 48 (2) extends the 12 years' period of closure by a further period of similar duration but the necessity of resort to Art. 182 is not thereby obviated. The decree-holder must have been taking steps to keep the decree alive and the only circumstance that can relieve him of this obligation is the existence of fraud under S. 18, Limitation Act: A I R 1939 Mad 270, *Rel. on.*

The argument that the effect of S. 48 is not merely to make the 12 years' period start from the discovery of fraud for the purpose of S. 48 (2), Civil P. C., but also to give a fresh starting point for the Schedule to the Limitation Act, cannot be accepted. If a man is prevented from making an application, because of the fraud of the debtor, he is not necessarily prevented from knowing his right to make the application. By the enactment of S. 18, the Legislature has distinctly contemplated that for the Limitation Act the starting point is changed on the ground of fraud, only when the knowledge of the right to make the application is prevented by the fraud of the judgment-debtor. Having the knowledge that he had the right to make the application, if the judgment-debtor prevents the decree-holder from knowing the existence of certain properties against which the decree could be enforced the case is clearly not covered by the words of S. 18, Limitation Act. Moreover, to read S. 18 as referring to an application for execution to proceed against a particular property would be destructive of the oneness of the decree and would lead to multiplicity of periods of limitation.

In the case of the fraud of the judgment-debtor, provision is made in S. 48 (2) for enlarging the 12 years period prescribed under S. 48. For defeating the plea of the bar of limitation under the Limitation Act, in the case of fraud of the judgment-debtor, provision is found in S. 18, Limitation Act. If the particular case of fraud set up and proved is not covered by those words, there is no protection against the same in the Limitation Act. Read in that way the two legislative provisions are neither conflicting

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nor overlapping; and they are capable of operating harmoniously, as they deal with different situations and circumstances. *Yeshwant* v. *Walchand*,

A I R (1951) S C 16=
1951 S C J 19=
1951 K L T (SC) 13=
1951 S C R 852=
1951 A L J (SC) 8=
1951 M W N 286=
64 M L W 353=
53 Bom L R 486.

(135) *Ss. 52 & 53 — Decree—Construction — Applicability of sections.*

The operative portion of the compromise decree stood as follows:

"It is ordered that the parties having compromised, a decree in accordance with the terms of the compromise be and the same is hereby passed in favour of the plaintiff against the estate of Baldev Das deceased in possession of his legal representatives."

Held, that as the decree fulfilled the conditions of S. 52 (1) it would attract all the incidents which attached by law to a decree of that character. Consequently the decree-holder would be entitled to call in aid the provision of S. 53: and if any property in the hands of the sons, other than what they received by inheritance from their father, was liable under the Hindu law to pay the father's debts, such property could be reached by the decree-holder in execution of the decree by virtue of the provision of S. 53. It is certainly possible for the parties to agree among themselves that the decree should be executed only against a particular property and no other, but when any statutory right is sought to be contracted out, it is necessary that express words of exclusion must be used. Exclusion could not be inferred merely from the fact that the compromise made no reference to such right. As nothing was said in the compromise decree about the right of the decree-holder to avail herself of provisions of S. 53 which might be available to her in law, it could not be said that the plaintiff had by agreement expressly given up those rights. *Panna Lal* v. *Mt. Naraini*,

A I R 1952 S C 170=
1952 S C R 544=
1952 S C J 211.

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(136) *S. 53 —Scope.*

Section 53 being only a rule of procedure cannot create or take away any substantive right. It is only when the liability of the sons to pay the debts of their father in certain circumstances exists under the Hindu Law, is the operation of the section attracted and not otherwise. *Panna Lal* v. *Mt. Naraini*, **A I R 1952 SC 170= 1952 S C R 544= 1952 S C J 211.**

(137) *S. 60 (i)—Arrears of salary—Liability to attachment.*

Salary is not attachable to the extent provided in clause (i) of Section 60, Civil P. C., but there is no such exemption as regards arrears of salary and allowance due to the judgment-debtor and such an amount can be proceeded against in execution. *Union of India* v. *Hira Devi*, **A I R 1952 S C 227= 1952 S C R 765= 1952 S C J 326.**

(138) *S. 80 —Section 80 does not apply to suit instituted in F. C.*

Per *Mahajan J.* — Rule 5 of the F. C. Rules framed under S. 214, Government of India Act, 1935, lays down that none of the provisions of the Code of Civil Procedure shall apply to any proceedings in the F. C. unless specifically incorporated in the rules and that being so, S. 80 cannot affect suits instituted in the F. C. under S. 204, Govt. of India Act, 1935.

Further as S. 80 only provides a mode of procedure for getting the relief in respect of a cause of action and does not confer any rights on the parties it was within the power of the F. C. to make a rule eliminating the application of S. 80 to suit filed before it. *State of Seraikella* v. *Union of India*, **A I R 1951 SC 253= 1951 S C J 425= 1951 S C R 474.**

—S. 92.

See also A. I. R. 1954 S. C. 5, under Trusts.

(139) *S. 92 — Suit by plaintiffs as validly constituted trustees.*

Held, on the facts of the case that this was a suit by the plaintiffs as the validly constituted trustees and not a suit under the section analogous to S. 92, Civil P. C., for removal of defendants from trusteeship or for the framing of a scheme. *Moran Mar Basselios Catholicos and another* v. *Most Rev. Mar Poulose Athanasius and others*, **A I R 1954 S C 526 (540).**

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(140) *S. 92—Scope—Prayer for declaration that properties are trust properties.*

In a suit framed under S. 92, the only reliefs which the plaintiff can claim and the Court can grant are those enumerated specifically in the different clauses of the section. A relief praying for a declaration that the properties in suit are trust properties does not come under any of these clauses. A suit under S. 92 is a suit of a special nature which presupposes the existence of a public trust of a religious or charitable character. When the defendant denies the existence of a trust, a declaration that the trust does exist might be made as ancillary to the main relief claimed under the section if the plaintiff is held entitled to it; but when the case of the plaintiff fails for want of a cause of action, there is no warrant for giving him a declaratory relief under the provision of S. 92. The finding as to the existence of a public trust in such circumstances would be no more than an *obiter dictum* and cannot constitute the final decision in the suit. *Pragdas Ji* v. *Ishwar Lal Bhai*, **A I R 1952 S C 143.**

(141) *S. 96—Appeal—Meaning of.*

Whether the appeal is valid or competent is a question entirely for the Appellate Court before whom the appeal is filed to determine, and this determination is possible only after the appeal is heard, but there is nothing to prevent a party from filing an appeal which may ultimately be found to be incompetent. *Raja Kulkarni, Appellant* v. *The State of Bombay*, **A I R 1954 S C 73 (74)=1954 S C J 50 =1954 S C R 384.**

(142) *S. 100—Finding of fact when not binding in second appeal.*

It is no doubt true that a finding of fact, however erroneous, cannot be challenged in a second appeal, but a finding reached on the basis of additional evidence which ought not to have been admitted and without any consideration whatever of the intrinsic and palpable defects in the nature of the entries themselves admitted as additional evidence which raise serious doubts about their genuineness, cannot be accepted as a finding that is conclusive in second appeal. *Arjan Singh* v. *Kartar Singh*, **A I R 1951 S C 193=1951 S C J 274= 1951 S C R 258.**

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(143) *S. 100—Interference with discretionary orders.*

Where the lower Courts in the exercise of their discretion have refused to grant relief against forfeiture the High Court in second appeal would be justified in refusing to interfere with that discretion exercised in a judicial manner. *Nam Deo* v. *Narmadabai*,

A I R 1953 S C 228.

(144) *Ss. 100, 101—Mixed question of law and fact — Nature of property—Concurrent finding — Supreme Court — Practice.*

The question as to non-ancestral nature of property is a mixed question of law and fact and when there is a concurrent finding on it of three Courts, it cannot be allowed to be re-opened in an appeal before the Supreme Court. *Gopal Singh and others* v. *Ujagar Singh and others*,

A I R 1954 S C 579 (580)= 1954 S C J 562.

(145) *S. 100—Question of law—Applicability of S. 18, Limitation Act, to proved facts.*

If the facts proved and found as established are sufficient to make out a case of fraud within the meaning of S. 18, Limitation Act, the objection that the plea under S. 18 was not taken in lower Courts or in the grounds of appeal is not serious, as the question of the applicability of the section will be only a question of law and such a question can be raised at any stage of the case and also in the final Court of appeal : (1892) A. C. 473, *Rel. on. Yeshwant* v. *Walchand*, **A I R 1951 S C 16= 1951 S C J 19=1951 S C R 852.**

(146) *S. 107—Appreciation of evidence by appellate Court—Finding of fact based on conflicting evidence, when can be reversed.*

Where the question for consideration for the appellate Court is undoubtedly one of fact, the decision of which depends upon the appreciation of the oral evidence adduced in the case, the appellate Court has got to bear in mind that it has not the advantage which the trial Judge had in having the witnesses before him and of observing the manner in which they deposed in Court. This certainly does not mean that when an appeal lies on facts, the appellate Court is not competent to reverse a finding of fact arrived at by the trial Judge. The rule is—

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and it is nothing more than a rule of practice — that when there is conflict of oral evidence of the parties on any matter in issue and the decision hinges upon the credibility of witnesses, then unless there is some special feature about the evidence of a particular witness which has escaped the trial Judge's notice or there is a sufficient balance of improbability to displace his opinion as to where the credibility lies, the appellate Court should not interfere with the finding of the trial Judge on a question of fact.

The appellate Court is wrong in thinking that it would detract from the value to be attached to a trial Judge's finding of fact if the Judge does not expressly base his conclusion upon the impressions he gathers from the demeanour of witnesses. The duty of the appellate Court in such cases is to see whether the evidence taken as a whole can reasonably justify the conclusion which the trial Court arrived at or whether there is an element of improbability arising from proved circumstances which, in the opinion of the Court, outweighs such finding. *Sarju Pershad* v. *Jawaleshwari*,

A I R 1951 S C 120=1950 S C J 583 = 1950 S C R 781.

(147) *S. 110—Decree of affirmance — (Constitution of India, Art. 133).*

It is always open to an appellant to support the certificate on grounds other than those on which it has been actually ordered to be given.

Costs are not taken into consideration and are treated as extraneous to the subject-matter of suit, and variation in the matter of costs does not make the decree of the appellate Court a decree of variance.

Where the appellant did not pray for the certificate on the ground of costs and had expressly alleged that the decree being one of affirmance he was entitled to a certificate, because the subject of the suit as well as of the appeal was a sum of over Rs. 10,000 and the case involved a substantial question of law and the ground on which the appeal was dismissed by the High Court raised a question of law of importance to the parties and that being so — *Held*, that on that ground alone the appellant was entitled to a certificate under S. 110, C. P. C. The certificate therefore was good, though the ground on which it was granted was

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erroneous. *Deputy Commissioner* v. *Rama Krishna* **A I R 1953 S C 521= 1954 S C R 506=1953 S C J 664.**

(148) *S. 112—Civil Procedure Code — Concurrent finding of fact—When can be attacked before Supreme Court.*

Where the question is whether the plaintiffs have proved that they are the next reversioners and both Courts below hold they have, that is a concurrent finding of fact which cannot be attacked before the Supreme Court unless it can be shown that the evidence on which the lower Courts have rested their decision is legally inadmissible *Sitaji* v. *Bijendra Narain Choudhary* **AIR 1954 S C 601 (602).**

—S. 112.

See also Practice.

(149) *S. 112—Findings of facts.*

The question of assessment of damages primarily is a question of fact and the concurrent findings of the Courts below on such points except in very exceptional circumstances are not reviewed by the Supreme Court — Supreme Court held had to arrive at its own finding in spite of the concurrent finding. *Trojan & Co.* v. *Nagappa* **A I R 1953 S C 235= 1953 S C R 789=1953 S C J 345.**

(150) *S. 112 — Concurrent findings of fact.*

The Supreme Court is usually reluctant to reinvestigate matters which have been fully investigated by the Courts below & on which there are concurrent findings, in the absence of any exceptional circumstances to induce it to depart from the sound & well-established practice. *Sukhdeo Singh* v. *Maharaja Bahadur* **A I R 1951 S C 288= 1951 S C J 386=1951 SCR 534.**

(151) *S. 112 — Concurrent findings of fact—Interference — (Supreme Court — Practice.)*

The Supreme Court would not ordinarily interfere with concurrent findings on pure questions of fact & review the evidence for the third time unless there are exceptional circumstances justifying departure from this normal practice. The position may undoubtedly be different if the inference is one of law from facts admitted & proved or where the finding of fact is materially affected by violation of any rule of law or procedure. The practice adopted by the Supreme Court is similar to what has always been acted upon by the Judicial Committee

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Firm Sirinivas Ram v. *Mahabir Prasad* **AIR 1951 S C 177= 1951 S C J 261=1951 S C R 277.**

(152) *S. 112 — Concurrent findings of fact —Interference with.*

Per *Mahajan J.* — It is not the practice of this Court ordinarily to interfere with concurrent conclusions on questions of fact reached in the Courts below unless those conclusions have been reached on extraneous considerations or by violating rules of procedure or by committing any breach of some provision of law *Nana Lal* v. *Bombay Life Assurance Co.* **AIR 1950 S C 172= 1950 S C J 337=1950 S C R 391.**

(153) S. 112—Question of law—Concurrent findings that tenancy is permanent — Supreme Court can consider the question since the question is one of proper inference in law to be deduced from facts : AIR 1927 P C 102, *Rel. on. Bejoy Gopal* v. *Pratual Chander* **AIR 1953 S C 153= 1953 S C R 930=1953 S C J 195.**

(154) S. 112—Practice—.Point not raised in lower Courts cannot be allowed to be raised before Supreme Court. *Mahavir Gope* v. *Harbans Narain,* **A I R 1952 S C 205=1952 S C R 775=1952 S C J 292**

(155) S. 141 — Applicability of, to proceedings under Administration of Evacuee Property Act — *See* A I R 1953 S C 298 under Administration of Evacuee Property Act, 1950.

(156) *S. 144—Scope.*

The doctrine of restitution is that on the reversal of a judgment the law raises an obligation on the party to the record, who received the benefit of the erroneous judgment, to make restitution to the other party for what he had lost and it is the duty of the Court to enforce that obligation unless it is shown that restitution would be clearly contrary to the interests of justice. *Bhagvant Singh* v. *Sri Krishan Das,* **A I R 1953 S C 130**

(157) *S. 144—Status quo ante.*

Where the judgment-debtor fails to show that the sale of his property was in substance and truth a consequence of the error in the decree that was reversed he cannot invoke the aid of S. 144; A I R 1932 Cal 303 and A I R 1941 Pat 130, *Applied. Bhagwant Singh* v. *Sri Krishan Das,* **A I R 1953 S C 130**

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(158) *S. 149 — Discretion of Court — Interference.*

The question of payment of court-fees is primarily a matter between the Government and the person concerned and therefore where the High Court in the exercise of his discretion allows the appellant to amend his memorandum of appeal and grants time for payment of deficient court-fee under S. 149, the other party cannot attack the order on ground that it takes away his valuable right to plead the bar of limitation. *Ganesh Parshad* v. *Narendra Nath*, **A I R 1953 S C 431**

(159) *S. 151 & O. 21, R. 85 — Inherent power of Court.*

The inherent powers of the Court cannot be invoked to circumvent the mandatory provisions of the Code and relieve the auction-purchasers of their obligation to make the deposit of purchase-money under O. 21, R. 85. *Manilal Mohanlal Shah and others* v. *Sardar Sayed Ahmed Sayed Mahmad and another.* **A I R 1954 S C 349 (352)**

(160) *S. 152 — Amendment proceedings — Nature of — Proceedings for amendment of order of single Judge of Pepsu High Court filed after Pepsu Ordinance 10 of 2005 (Sm.) came into force — Appeal — Certificate of fitness—Necessity — (Pepsu Judicature Ordinance 10 of 2005 (Sm) (1948-49), S. 52).*

There is no warrant for the view that the amendment petition under S. 152, Civil P. C., is a continuation of the suit or proceedings therein. It is in the nature of an independent proceeding, though connected with the order of which amendment is sought. Such a proceeding is governed by the law prevailing on its date and not by the law prevailing on the date of that proceeding in which the order sought to be amended was passed.

Where an application under S. 152, Civil P. C. for amendment of an order of liquidation Judge of the Pepsu High Court, was made after the Pepsu Ordinance 10 of 2005 (Sm.) came into force : *Held*, that the proceedings were governed by the Pepsu Ordinance 10 of 2005 and that no appeal under S. 52 of the ordinance lay from the order of the Single Judge dismissing the amendment petition to a Division Bench without a certificate that the case was a fit one for

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appeal. *Ganpat Rai* v. *Chamber of Commerce* **A I R 1952 S C 409 = 1953 S C R 752 = 1952 S C J 564.**

(161) *O. 1, Rr. 1, 3, 9, 10 — Proceedings under U. P. Encumbered Estates Act (25 of 1934) — (Debt Laws — U. P. Encumbered Estates Act (25 of 1934), S. 11).*

In the administrative proceedings under the U. P. Encumbered Estates Act technical rules of the First Schedule of the Code of Civil Procedure regarding impleading of parties should not be involved and the matter should be viewed in a more liberal way, regard always being had to the fact that there is no collusion between the debtor and the claimant and that there are persons who are bona fide litigating in respect of the title of the claimant under S. 11 of the Act and if there has been such a bona fide fight which results in a decree, in an appeal against that decree it is sufficient that those who took an active part in the proceedings under S. 11 are impleaded. It is not necessary to implead each and every creditor who either did not appear or put forward a written statement under S. 10 or took no active part in the proceedings under S. 11 (2). A I R 1941 Oudh 580, Distinguished. *Deputy Commissioner* v. *Rama Krishna.* **A I R 1953 S C 521=1954 S C R 506= 1953 S C J 664.**

(162) *O. 2, R. 4 — Joinder of claim for redemption and one for possession and partition in one suit — Competency.*

So long as no question of limitation is involved, there is no objection to a claim for redemption and one for possession and partition being joined together in the same suit brought by a co-mortgagor against another co-mortgagor who alone has redeemed the mortgaged property belonging to the joint family. *Ganeshi Lal* v. *Joti Pershad*, **A I R 1953 S C 1**

—O. 3, R. 4.

See also A. I. R. 1953 S. C. 98 under Indian Companies Act.

(163) *O. 3, R. 4—Erroneous admission on question of law.*

An erroneous concession of law made by the defendants' Advocate cannot be relied upon for saving the plaintiffs. *Moran Mar Basselious Catholicos and another* v. *Most Rev. Mar Poulose Athanasius and others*, **A I R 1954 S C 526 (527)**

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(164) *O. 6, R. 2 and O. 7, R. 7—Alternate and inconsistent allegations — Right to plead — Variance between pleading and proof.*

A plaintiff may rely upon different rights alternatively and there is nothing in the C. P. C. to prevent a party from making two or more inconsistent sets of allegations and claiming relief thereunder in the alternative. Ordinarily, the Court cannot grant relief to the plaintiff on a case for which there was no foundation in the pleadings and which the other side was not called upon or had an opportunity to meet. But when the alternative case, which the plaintiff could have made, was not only admitted by the defendant in his written statement but was expressly put forward as an answer to the claim which the plaintiff made in the suit, there would be nothing improper in giving the plaintiff a decree upon the case which the defendant himself makes. A demand of the plaintiff based on the defendant's own plea cannot possibly be regarded with surprise by the latter and no question of adducing evidence on these facts would arise when they were expressly admitted by the defendant in his pleadings. In such circumstances, when no injustice can possibly result to the defendant, it may not be proper to drive the plaintiff to a separate suit.

Thus, where in a suit for specific performance of a contract, in part performance of which the plaintiff alleges to have paid the defendant some money, the defendant denies the contract and pleads that the money was taken by him as a loan, the Court can pass a decree for recovery of the loan in favour of the plaintiff on his failure to prove the contract even though the plaintiff had failed to plead, and claim relief on, this alternative case. *Firm Sirinivas Ram* v. *Mahabir Prasad,* A I R 1951 S C 177=1951 S C J 261 = 1951 S C R 277.

(165) *O. 6, R. 2 — Construction of pleadings.*

The Court would be slow to throw out a claim on a mere technicality of pleading when the substance of the thing is there and no prejudice is caused to the other side however clumsily or inartistically the plaint may be worded. In any event, it is always open to a Court to give a plaintiff such general or other relief as it deems just to the same extent as if it had been asked for, provided that occasions no prejudice to the other side beyond what can be compensated for in costs. *Kedar Lal* v. *Hari Lal,* A I R 1952 S C 47

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(166) *O. 6, R. 2; O. 20, R. 4—Contents of judgment.*

The decision of a case cannot be based on grounds outside the pleadings of the parties and it is the case pleaded that has to be found. Without an amendment of the plaint the Court was not entitled to grant the relief not asked for. *Trojan & Co.* v. *Nagappa,* A I R 1953 S C 235= 1953 S C R 789=1953 S C J 345

(167) *O. 6, R. 2 — Method of computation.*

The method of computation is a matter of law and it is for the Judge to apply the law to the facts stated and give the plaintiff such relief as is appropriate to the case. *Kedar Lal* v. *Hari Lal* A I R 1952 S C 47

(168) *O. 6, R. 2—New case—Pleadings and proof at variance.*

It is not right for the Court, on failure of a party to prove his case, to make out a new case for him which was not only not made in his written statement but which is wholly inconsistent with the title set up by him. *Sheodhari Rai* v. *Suraj Prasad Singh,* A I R 1954 S C 758 (760)

(169) O. 6, R. 2 — Sale of patni interest by plaintiff — Purchaser resettling some lands with plaintiff — Plaintiff paying rent to purchaser of patni and latter treating plaintiff as tenant — Purchaser of touzi, held, had no right to question plaintiff's interest — Purchaser of touzi, held, could not be said to be prejudiced in absence of specific pleading as to resettlement, in plaintiff's suit for declaration against purchaser of touzi. *Vishwamitra Press, Kanpur* v. *Workers of Vishwamitra Press,* A I R 1953 S C 41

(170) *O. 6, R. 4 — Fraud, undue influence and coercion — Particulars.*

Though pleas of undue influence and coercion may overlap in part in some cases, they are separable categories in law and must be separately pleaded.

In cases of fraud, undue influence and coercion, the parties leading it must set forth full particulars and the case can only be decided on the particulars as laid. There can be no departure from them in evidence. General allegations are insufficient even to amount to an averment of fraud of which

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any Court ought to take notice, however strong the language in which they are couched may be, and the same applies to undue influence and coercion.

In the case of coercion when a Court is asked to find that a person was threatened with death it is necessary to give particulars as to the nature of the threat, the circumstances, the date, time and place in which it was administered and the name of the person threatening. In the absence of such particulars it would be impossible to reach a proper conclusion. *Bishundeo* v. *Seogeni Rai*, A I R 1951 S C 280= 1951 S C R 548=1951 S C J 413

(171) *O. 6, R. 8; O. 8, R. 2 and O. 41, R. 2 — Factum of contract denied — Question whether contract conformed to provisions of S. 30, Government of India Act, not raised in pleadings — Effect — (Government of India Act (1915), S. 30).*

The provisions contained in O. 6, R. 8 and O. 8, R. 2 leave no doubt that the party denying merely the factum of the contract and not alleging its unenforceability in law must be held bound by the pleadings and be precluded from raising the legality or validity of the contract. Thus, where the question whether a lease granted by the Government conformed to the provisions of S. 30 of the Government of India Act, 1915, was not raised in the pleadings nor in the memorandum of appeal to the High Court but was mentioned for the first time in the course of arguments before that Court, *Held* that the question could not be allowed to be raised at the time of the arguments when the plaintiff-lessee had no opportunity to adduce evidence upon the question of fact whether the lease was signed on behalf of the Government. *Kalyanpur Lime Works Ltd.* v. *State of Bihar*, A I R 1954 S C 165 (169)= 1954 S C R 958=1954 S C J 49

(172) *O. 6. R. 17 and O. 41, R. 33 — Remand consequent on amendment of plaint in appeal.*

Plaintiff not claiming relief in proper form though facts on which relief in proper form could be given were all set out in plaint — Amendment at appellate stage claiming relief in proper form, purely of formal character — If the appellate Court thinks that any reply to the amendment by the defendant is necessary it should call one from the defendant and should itself determine whether, and if so how far, further proceedings were called for — Remand of case to lower Court held unnecessary. *Gopal* v. *Mohammad Gaffar*, A I R 1954 S C 5.

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(173) *O. 7, R. 18 — Document called for and exhibited by party.*

While a plaintiff was under examination he called for certain documents from the defendant and tendered some of them. One of the documents called for by him and produced by the defendant and exhibited as exhibit D-9 was plaintiff's gratuity application regarding full gratuity being paid to him — *Held* that in the circumstances, the plaintiff could not be heard to say that the document called for and exhibited by him was not his gratuity application and that it was not filed by him. *Gopal Krishna Potnay* v. *Union of India and another*, A I R 1954 S C 632 (633).

(174) *O. 8, R. 6 — Equitable set-off — When allowed — Patnidar granted mesne profits against Zamindar — Amount for rent, revenue and cess due to Zamindar after delivery of possession — Zamindar cannot claim equitable set-off.*

A plea in the nature of equitable set-off is not available when the cross-demands do not arise out of the same transaction.

Thus where '*A*', a patnidar, is allowed mesne profits against '*B*', his zamindar, for the period during which '*B*' was in wrongful possession of '*A*''*s* lands, '*B*' cannot claim equitable set-off against '*A*' for the amounts due to him in respect of rent, revenue and cess for the period subsequent to the delivery of possession to '*A*' as the claims neither relate to the same period nor do they arise out of the same cause of action. The transaction which led to '*A*''*s* demand resulted from '*B*''*s* wrongful act as a trespasser, while the transaction giving rise to '*B*''*s* demand arises out of the relationship of landlord and tenant and the obligations resulting therefrom. A wrongdoer who has wrongfully with held moneys belonging to another cannot invoke any principles of equity in his favour and seek to deduct therefrom the amounts that during this period, have fallen due to him. There is nothing improper or unjust in telling the wrongdoer to undo his wrong and not to take advantage of it. Such a person cannot be helped on any principles of equity to recover amounts for the recovery of which

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he could have taken action in due course of law and which for some unexplained reason he failed to take and which claim may have by now become barred by limitation. *Bhupendra Narain* v. *Bahadur Singh*,

A I R 1952 S C 201.

O. 13, R. 2—Accounts — Non-production of

See A. I. R. 1953 S. C. 225, under Evidence Act.

(175) *O. 14, R. 4 — Duty of Court.*

When in a suit on the basis of adjustment of accounts the defendants plead in their written statement that they had signed the accounts without understanding them and on the faith of certain representation made by the plaintiff, the Judge should try to ascertain or apprehend the nature of plea taken. Before framing an issue. it is his duty to examine the parties and to find out the precise nature of the pleas involved within these facts; in other words, whether the defendants wished to plead in defence fraud, coercion, undue influence or a mistake of fact entitling them to re-open the accounts. *Hira Lal* v. *Badkulal*,

A I R 1953 S C 225
=1953 S C R 758=1953 S C J 316.

(175A) *O. 20 R. 4—Full Bench judgment.*

Full Bench Judgment — Contention that the judgment of one of the judges was only a supplementary judgment as he prefaced his judgment with the observatoin that he entirely agreed with the findings of the other judge would have some force only if the latter has dealt with the particular point in his judgment. *Moran Mar Basselios Catholicos* v. *Most Rev. Mar Poulose Athanasius*

A I R 1954 S C 526 (539).

(175B) *O. 20, R. 12 — Alienation by Hindu widow — Suit for possession by reversioners — Mesne profits — Claim for, from widow's death — (Limitation Act (1908), Art. 141) — (Hindu Law — Reversioners).*

A reversioner's suit for recovery of possession of the property alienated by a widow is governed by Art. 141, limitation Act, and as it is not necessary that the transfer should be set aside before any decree for possession is made all that is necessary is that the reversioner should file a suit for possession within 12 years from the death of the widow and a decree passed in such a suit must be on the basis that possession of the

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transferee was unlawful ever since the widow died. This being the position, it is quite proper to allow the reversioner mesne profits against the alienee from the date of the widow's death. There is no rule of law that no mesne profits can be allowed in a case where the alienation cannot be described as absolutely void. 35 Ind. App. 48 (P. C.); 35 Cal. 420 (P. C.) and A. I. R. 1932 P. C. 89, *Ref.*; A. I. R. 1918 P. C. 118, *Disting. Mummareddy* v. *Durairaja*,

A I R 1952 S C 109
=1952 S C J 192.

(175C) O. 20, R. 12—Mesne profits not specifically claimed—Prayer for awarding 'possession and occupation of the property together with all the rights appertaining thereto'—Prayer does not include claim for mesne profits—Grant of mesne profits held not correct. *Mohammed Amin* v. *Vakil Ahmed*,

A I R 1952 S C 358
=1952 S C R 1133=1952 S C J 539.

(175D) Civil Procedure Code (1908), O. 20, R. 12—Interest on mesne profits—Plaintiff not prompt in getting mesne profits ascertained—Enquiry taking about twelve years —Interest allowed at 4 per cent. instead of at 6 per cent. *Bhupendra Narain* v. *Bahadur Singh*,

A I R 1952 S C 201.

(175E) *O. 20, R. 14—Extension of time —Effect of appeal on time fixed for payment.*

Mere filing of an appeal does not suspend the decree for pre-emption and unless that decree is altered in any manner by the Court of appeal the pre-emptor is bound to comply with its directions with regard to the deposit of amount within the fixed time. *Nagoba Appa*, v. *Namdev*,

A I R 1954 S C 50 (51).

(175F) *O. 20, R. 14—Extension of time —Effect of failure to deposit within the time allowed.*

The dismissal of the suit on default in paying the purchase money within the time allowed is as a result of the mandatory provisions of O. 20, R. 14 and not by reason of any decision of the Court. The omission to incorporate the direction in the decree to the effect that if the deposit was not made within the time fixed the suit will stand dismissed, cannot therefore in any

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way affect the rights of the parties. *Nagoba Appa* v. *Namdev*,

A I R 1954 S C 50 (51).

(175G) *O. 21, Rr. 6, 90— Omission to send certificate.*

Per Das J.: An omission to send a copy of the decree or an omission to transmit to the Court executing the decree the certificate referred to in Cl. (b) of O. 21, R. 6 does not prevent the decree-holder from applying for execution to the Court to which the decree has been transmitted. Such omission does not amount to a material irregularity within the meaning of O. 21, R. 90 and as such cannot be made a ground for setting aside a sale in execution. *Mohan Lal* v. *Benoy Kishana*,

A I R 1953 S C 65
=1953 S C R 377=1953 S C J 130.

(175H) *O. 21, R. 11—Execution by sale —Knowledge of judgment-debtor's property—Duty of decree-holder.*

There is no obligation on the judgment-debtor to post the decree-holder with all details of his properties; it is the decree-holder's business to gather knowledge about the properties so that he can realise the fruits of his decree. *Yeshwant* v. *Walchand*,

A I R 1951 S C 16
=1951 S C J 19=1951 S C R 852.

(175I) *O. 21, R. 35 and S. 47 — Removal of person bound by decree.*

It may be assumed as a proposition of law that a sub-lessee would be bound by a decree for possession obtained by the lessor against the lessee, no matter whether the sub-lease was created before or after the suit, provided the eviction is based on a ground which determines the sub-lease also. A I R 1945 Cal 283 and A I R 1932 Cal 241, *Rel, on.*

But that principle cannot be applied where the decree was obtained by the decree-holder, not in a suit brought by him for eviction as lessor against his lessee, but in a suit brought by him as the holder or manager of the Math to recover possession of Math property on the ground that it had been improperly alienated by his predecessor and that the defendant became a trespasser as soon as the previous Mahant died and that he was entitled to recover possession on proof of his title, and where in addition the person who is sought to be bound by that decree, as a sub-lessee of the

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judgment-debtor, is not a sub-lessee but is his donee under a gift deed. Even though a condition for reversion of the property to the donor is attached to the gift deed such a condition would not convert the gift deed into a sub-lease.

In a case where the principle can be applied a separate suit for khas possession against the sub-lessee would be barred under S. 47 and the proper remedy of the decree-holder would be to apply for execution of the decree in the suit. That difficulty, however, is not insuperable, as under S. 47, Civil P. C. the Court is empowered to treat a suit as an execution proceeding, when there is no question of limitation or jurisdiction standing in the way of the plaintiff. *Gurushiddaswami* v. *D. M. D. Jain Sabha*,

A I R 1953 S C 514
=1953 S C J 730.

(175J) *O. 21, R. 57 (Cal) — Scope.*

Order 21, R. 57 as amended by the Calcutta High Court leaves three courses open to the executing Court in case it finds it difficult to proceed with the execution case by reason of the default of the decree-holder. It may (1) adjourn the proceedings for good reason which will automatically keep the attachment alive or (2) simply dismiss the application which will automatically destroy the attachment or (3) dismiss the application but specifically keep alive the attachment by an express order. The rule, as amended, therefore, contemplates three distinct forms of order, any one of which may be made by the Court in the circumstances mentioned in the rule. *Pashupatinath Malia* v. *Deba Prosanna*,

A I R 1951 S C 447
=1951 S C J 506
=1951 S C R 572.

(175K) *O. 21, R. 84—Rule is mandatory.*

The provision regarding the deposit of 25 per cent. by the purchaser other than the decree-holder is mandatory as the language of the rule suggests. *Manilal Mohanlal Shah* v. *Sardar Sayed Ahmed Sayed Mahmad*,

A I R 1954 S C 349 (351).

(175L) *O. 21, R. 84 — Set off.*

The provision relating to a set-off contained in O. 21, R. 84 applies only to the decree-holder. The Court has no jurisdiction to allow a set-off when the purchaser is other than the decree-holder. *Manilal*

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Mohanlal Shah v. *Sardar Sayed Ahmed Sayed Mahmad*,
A I R 1954 S C 349 (351).

(175M) *O. 21, Rr. 84, 85 and 86—Stranger auction-purchaser — Non payment of price — Sale is wiped out.*

The provisions of O. 21, Rr. 84, 85 and 86 requiring the deposit of 25 per cent. of the purchase-money immediately, on the person being declared as a purchaser, such person not being a decree-holder, and the payment of the balance within 15 days of the sale, are mandatory and upon non-compliance with these provisions there is no sale at all. The rules do not contemplate that there can be any sale in favour of a stranger purchaser without depositing 25 per cent. of the purchase-money in the first instance and the balance within 15 days. When there is no sale within the contemplation of these rules, there can be no question of material irregularity in the conduct of the sale. Non-payment of the price on the part of the defaulting purchaser renders the sale proceedings as a complete nullity. The very fact that the Court is bound to resell the property (Rule 86) in the event of a default shows that the previous proceedings for sale are completely wiped out as if they do not exist in the eye of law. *Manilal Mohanlal Shah* v. *Sardar Sayed Ahmed Sayed Mahmad*,
A I R 1954 S C 349 (351).

(175N) *O. 21, R. 86 — Effect of non-payment.*

If the payment is not made within the period of fifteen days, the Court has the discretion to forfeit the deposit and there the discretion ends: but the obligation of the Court to resell the property is imperative. A further consequence of non-payment is that the defaulting purchaser forfeits all claim to the property. *Manilal Mohanlal Shah* v. *Sardar Sayed Ahmed Sayed Mahmad*,
A I R 1954 S C 349 (351).

(176) *O. 32, R. 7 — Leave of Court — Substantial compliance.*

There is no set form in which the certificate which the Court is required to record need be made. Where the judge passes an order granting permission to compromise on behalf of the minor on ground that it is for minor's benefit after applying his mind to the question, there is substantial compliance

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with O. 32, R. 7. *Bishundeo* v. *Seogeni Rai*,
A I R 1951 S C 280
=1951 S C R 548
=1951 S C J 413.

(177) *O. 32, R. 7 — Leave of Court not necessary to negotiate or conclude provisional agreement with other side.*

Order 32, R. 7 read as a whole, clearly means that no next friend or guardian for the suit can enter into agreement or compromise which will bind the minor unless the Court sanctions it. A compromise without leave of Court and a decree passed thereon is not a nullity but is merely voidable at the option of the minor. It is not necessary that the guardian should obtain the sanction even before he begins negotiations with the other side. Such sanction is not necessary even to enable a guardian to conclude a provisional agreement with a view to compromise. A I R 1937 All 65 (F B) Expl. 19 Pat 343 : A I R 1940 Pat 663 : 1921 C 170, OVERRULED. *Bishundeo* v. *Seogeni Rai*,
A I R 1951 S C 280
=1951 S C R 548
=1951 S C J 413.

—O. 41, R. 22—Applicability.

See A. I. R. 1954 S. C. 513 under Constitution of India, Art. 136.

(178) *O. 41, R. 27 — Discretion to admit additional evidence — How to be exercised.*

The discretion given to the appellate Court by O. 41, R. 27 to receive and admit additional evidence is not an arbitrary one, but is a judicial one circumscribed by the limitations specified in that rule. If the additional evidence is allowed to be adduced contrary to the principles governing the reception of such evidence, it will be a case of improper exercise of discretion, and the additional evidence so brought on the record will have to be ignored and the case decided as if it is non-existent. *Arjan Singh* v. *Kartar Singh*,
A I R 1951 S C 193
=1951 S C J 274=1951 S C R 258.

(179) *O. 41, R. 27 — Additional evidence when to be admitted.*

Where the first appellate Court admitted additional evidence before examination of the evidence on the record and consequently before reaching a decision that the evidence as it stood disclosed a lacuna which the Court required to be filled up for pronouncing its judgment :

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Held, that the appellate Court was not justified in admitting the additional evidence. *Arjan Singh* v. *Kartar Singh*,

A I R 1951 S C 193 Supra.

(180) *O. 41, R. 27 — Additional evidence taken by appellate Court — Case covered by — Objection in second appeal— Maintainability.*

Where the appeal Court allows the additional evidence to be given in order to clear up certain matter and for the purpose of enabling it to come to a proper decision on the point, the matter is fully covered by O. 41, R. 27, Civil P. C., and no objection can be taken to the course adopted by the appellate Court in second appeal as there is no reason to interfere in the exercise of the Court's discretion. *Kamala Ranjan* v. *Baijnath*,

A I R 1951 S C 1 =1951 S C J 13=1950 S C R 840.

(181) *O. 41, R. 27—Test for admitting additional evidence.*

The legitimate occasion for the application of O. 41, R. 27 is when, on examining the evidence as it stands, some inherent lacuna or defect becomes apparent, not where a discovery is made, outside the Court, of fresh evidence and the application is made to import it. The true test, therefore, is whether the appellate Court is able to pronounce judgment on the materials before it without taking into consideration the additional evidence sought to be adduced. *Arjan Singh* v. *Kartar Singh*,

A I R 1951 S C 193 =1951 S C J 274=1951 S C R 258.

(182) *O. 47, R. 1 — Error apparent on face of the record — Decision on matters not covered by issues.*

To decide against a party on matters which do not come within the issues on which the parties went to trial clearly amounts to an error apparent on the face of the record. It is futile to speculate as to the effect these matters had on the minds of the judges in comparison with the effect of the other points. *Moran Mar Basselios Catho licos* v. *Most Rev. Mar Poulose Athanasius*,

A I R 1954 S C 526 (545).

(183) *O. 47, R. 1 — Error apparent on the face of the record.*

The majority judgments of the Full Bench were defective on the face of them in that they did not effectively deal with and determine an important issue in the

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case on which depended the title of the plaintiffs and the maintainability of the suit. This was certainly an error apparent on the face of the record. *Moran Mar Basselious Catholicos* v. *Most Rev. Mar Poulose Athanasius*,

A I R 1954 S C 526 (540).

(184) *O. 47, R. 1 — "Any other sufficient reason"—Meaning of.*

The words "any other sufficient reason" must mean a reason sufficient on grounds, at least analogous to those specified in the rule. *Moran Mar Basselios Catholicos* v. *Most Rev. Mar Poulose Athanasius.*

A I R 1954 S C 526 (538).

(185) *O. 47, R. 1—Any other sufficient reason—What amounts to.*

Held, that the Judges in the High Court took the view that even if, as held by the District Judge, the plaintiffs had been guilty of acts and conduct imputed to them it was not necessary for them to enquire whether those acts were merely heresy or also amounted to a setting up of a new church or whether the Canon law requiring the verdict of an ecclesiastical authority applied to both or only to acts of heresy. This attitude they adopted simply because of what they understood was the concession made by the defendants' abvocate, namely, that the plaintiffs had not gone out of the church. The Judges did not appear to have examined the question or considered whether voluntarily going out of the church was a concept separate and distinct from acts of heresy and if so whether the acts and conduct imputed to the plaintiffs apart from being acts of heresy from an ecclesiastical point of view, amounted also to voluntarily going out of the church by establishing a new church. Nor did they appear to have considered whether the Canon law requiring verdict of an ecclesiastical authority was required in both cases.

What the Advocate for the defendants did was to accept the Canon law, as interpreted by the District Judge, namely, that nobody goes out of the church without the verdict of an ecclesiastical authority, whether the acts complained of amount to acts of heresy or to the establishment of a new church so as to make the persons who are guilty of such conduct aliens to the faith. If the Judges took the view that such was not the Canon law and that the same acts and conduct might have an ecclesiastical aspect

in the sense that they amount to heresy punishable as such and might also amount to a voluntary separation from the church which is not an ecclesiastical offence and does not require the verdict of any ecclesiastical authority to place the guilty person out of the church then it was clearly incumbent upon the Judges to consider whether the acts and conduct of which the plaintiffs had been found guilty had actually been committed by them and whether such acts and conduct also had the dual aspect, namely amounted to an ecclesiastical offence requiring excommunication and also to a voluntary separation which not being an ecclesiastical verdict to place a guilty person out of the pale of the church. This, on the face of the judgment, the Judges failed to do.

On a fair reading of the judgments the Judges had been misled by a misconception as to the nature and scope of the concession alleged to have been made by the defendants' Advocate. They could not properly decline to go into the question of fact on account of the admission of the defendants' Advocate that the plaintiffs remained in the church. Such admission at best was an admission as to the canon law and the decision that the defendants had voluntarily gone out of the church even in the absence of an ecclesiastical verdict necessarily implied that the concession made by the defendants' Advocate requiring an ecclesiastical verdict as a condition precedent to voluntary separation also was obviously wrong. Hence the judgments of the Judges were vitiated by an error of a kind which was sufficient reason within the meaning of the Code of Civil Procedure for allowing the review. *Moran Mar Basselios Catholicos* v. *Most Rev. Mar Poulose Athanasius*

A I R 1954 S C 526 (541, 542, 543, 544, 545).

(186) *O. 47, R. 1 — Misconception of Court—Sufficient reason.*

The proper procedure is to move the Court in whose judgment the error is alleged to have crept in. The application by way of review is to be made to the Court whose judgment is said to be founded on a misconception as to the concession made by the Advocate appearing before it. A misconception by the Court of a concession made by the Advocate or of the attitude taken up by the party appears to be a

ground analogous to the grounds set forth in the first part of the review section and affords a good and cogent ground for review. There is no reason to construe the word "record" in a very restricted sense and include within that term only the document which initiates the proceedings, the pleadings and the adjudication and exclude the evidence and other parts of the record.

Further, when the error complained of is that the Court assumed that a concession had been made when none had in fact been made or that the Court misconceived the terms of the concession or the scope and extent of it, it will not generally appear on the record but will have to be brought before the Court by way of an affidavit and this can only be done by way of review. The misconception of the Court must be regarded as sufficient reason analogous to an error on the face of the record. It is permissible to rely on the affidavit as an additional ground for review of the judgment. *Moran Mar Basselios Catholicos* v. *Most Rev. Mar Poulose Athanasius*

AIR 1954 S C 526 (543).

(187) *O. 47, R. 8—Effect of review.*

A judgment of the Court cannot be regarded as having any bearing after that judgment was set aside in review subject to the points which were taken as binding. *Moran Mar Basselios Catholicos* v. *Most Rev. Mar Poulose Athanasius*

AIR 1954 S C 526 (544).

CIVIL SERVICES REGULATIONS (1920)

See also Constitution of India, Art. 311.

(188) *R. 4 and Art. 465-A, Note 1 (inserted by Resolution No. 714)—Applicability to officer by Secretary of State for India—(Government of India, Act (1919), S. 96-B (4)) — (Constitution of India, Art. 311.)*

The Resolution No. 714, C. S. R. dated the 10th May 1920 and Resolution No. 1003 — C. S. R. did not and could not affect the validity or force of the new rules announced on the 15th November 1919. The purpose of publishing the new rules in the form of amendments to the Civil Service Regulations, was only to clarify the exact scope of those new rules and not to bring them into force for the first time. The new rules came into operation 'ex proprio vigore' on their publication in the

official Gazette on the 15th November 1919 and their subsequent publication for general information in the form of amendment to the Civil Service Regulations only served to make their exact scope clear. The purpose of Note 1 is not to confer on the Government any new right to compulsorily retire an officer on completion by him of twenty five years' service but it is intended to serve as a reminder that the Government already has such right which it means to "retain". The language of Note 1 to Article 465A makes it abundantly clear that the Government's right to compulsorily retire an officer is not derived from Note 1. Note 1 only assumes its existence aliunde and indicates when that existing right is to be exercised and what consequences are to follow if that right is exercised. That right is obviously derived from new Rule 4 which was announced by Resolution No. 1054 E. A. on the 15th November 1919. Being in operation at the date of the passing of the Government of India Act, 1919 that rule, by virtue of sub-s. (4) of S. 96B of that Act, will become binding on an officer although he was employed by the Secretary of State for India and consequently Art. 465-A is applicable to such officer. *Shyamlal* v. *State of Uttar Pradesh*

AIR 1954 S C 369 (372)
=1954 S C J 493.

(189) *Art. 465-A, Note 1 — Compulsory retirement — Applicability of Art. 311 of Constitution — Note 1, if repugnant to Art. 311—(Constitution of India, Art. 311) — (Civil Services (Classification, Control and Appeal) Rules, Rr. 49 and 55.)*

There can be no doubt that removal (using the term synonymously with dismissal) generally implies that the officer is regarded as in some manner blameworthy or deficient, that is to say, that he has been guilty of some misconduct or is lacking in ability or capacity or the will to discharge his duties as he should do. The action of removal taken against him in such circumstances is thus founded and justified on some ground personal to the officer. Such ground, therefore, involves the levelling of some imputation or charge against the officer which may conceivably be controverted or explained by the officer. There is no such element of charge or imputation in the case of compulsory retirement. Further R. 49 of the Civil Services (Classification,

Control and Appeal Rules clearly indicates that dismissal or removal is a punishment. This is imposed on an officer as a penalty. It involves loss of benefit already earned. But an officer who is compulsorily retired does not lose any part of the benefit that he has earned. On compulsory retirement he will be entitled to the pension etc. that he has actually earned. There is no diminution of the accrued benefit.

A compulsory retirement therefore does not amount to dismissal or removal and, therefore, does not attract the provisions of Art. 311 of the Constitution or of R. 55 and Note 1 to Art. 465-A of the Civil Service Regulations is not repugnant to Art. 311.

The order of the President of India compulsorily retiring an officer cannot therefore be challenged on the ground that he had not been afforded full opportunity of showing cause against the action sought to be taken in regard to him. *Shyamlal* v. *State of Uttar Pradesh*

AIR 1954 S C 369 (374, 375)
=1954 S C J 493.

COMPANIES ACT (VII OF 1913)

(190) *S. 34 and Table A, Reg. 18 — Transfer of Shares—Relationship between transferor and transferee — Obligations of transferor—(Trusts Act (1882), S. 94).*

On the transfer of shares, the transferee becomes the sole beneficial owner of those shares sold by the transferor, the legal title to which is vested in him. Thus, the relation of trustee and 'cestui que trust' is thereby established between them. The transferor holds the shares for the benefit of the transferee to the extent necessary to satisfy the demands of S. 94, Trusts Act, 1882. As the transferee holds the whole beneficial interest and transferor has none, the transferor must comply with all reasonable directions that the transferee may give. In this situation if he becomes a trustee of dividends he is also a trustee of the right to vote because the right to vote is a right to property annexed to the shares and as such the beneficiary has a right to control the exercise by the trustee of the right to vote. 45 Bom L R 46, *Rel. on.*

The relationship arises by reason of the circumstance that till the name of the

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transferee is brought on the register of share-holders in order to bring about a fair dealing between the transferor and the transferee, equity clothes the transferor with the status of a constructive trustee and this obliges him to transfer all the benefits of property rights annexed to the sold shares of the 'cestui que trust'. That principle of equity cannot be extended to cases where the transferee has not taken active steps to get his name registered as a member on the register of the company with due diligence and in the meantime certain other privileges or opportunities arise for purchase of new shares in consequence of the ownership of the shares already acquired.

The principles of justice require that 'cestui que trust' who gets all the benefit of the property should bear its burden unless he can show some good reason why his trustee should bear them himself. (1901) A C 118, *Rel. on. R. Mathalone* v. *Bombay Life Assurance Company*,

A I R 1953 S C 385
=1954 S C R 117.

(190-A) *S. 38—Power of Court — Civil P. C. (1908), O. 3, R. 4.*

Application for rectification of alleged wrongly recorded shares should be accompanied by affidavit of counsel. Party cannot challenge form of order under S. 38 to which its counsel consented. A I R 1917 P C 30 and A I R 1951 Mad 796, *Rel. on*; A I R 1951 Mad 572, *Reversed. Sha Mul Chand & Co.* v. *Jawahar Mills Ltd.*,

A I R 1953 S C 98
=1953 S C R 351=1953 S C J 68.

(190-B) *S. 105-C — Scope.*

Section 105-C limits the powers of the directors to dispose of the further issue of capital in any manner that they may think most beneficial to the company. They are under a mandate to offer these shares in the first instance to the members in proportion to the existing shares held by them. Thus, a member becomes entitled under the provisions of this section by reason of his being the holder of a certain number of shares in the company, to obtain shares in the further issue of capital as of right.

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R. Mathalone v. *Bombay Life Assurance Company* **A I R 1953 S C 385 = 1954 S C R 117.**

(190-C) *S. 105-C — Duty of transferor of shares to acquire further shares for transferee—(Trusts Act (1882), S. 94).*

A transferor of a certain number of shares who being the legal owner of those shares and the beneficial interest of which vests in the 'cestui que trust' (the transferee), is not liable for all the payments and obligations attaching to the new issue of shares. He is not bound to act in both respects for the benefit of the 'cestui que trust'. He is not under a duty, when so instructed by his beneficiary, to make an application for the new issue of shares offered under the provisions of S. 105 C and obtain them in his name by making the necessary payments and by incurring the consequential obligations. Thus, the obligation of a transferor of a certain number of shares as a trustee does not extend also in respect of the right to acquire further shares issued by the company on behalf of his 'cestui que trust' by putting himself on the register of shareholders in respect of the new shares regarding which he may have to incur fresh liabilities and obligations which were not existing at the time when he made the transfer. (1903) 2 Ch 40; (1913) 1 Ch 23, *Disting*; A I R 1950 Bom 76, *Reversed. R. Mathalone* v. *Bombay Life Assurance Co.*, **A I R 1953 S C 385 (Supra)**

(190-D) *S. 105-C—Receiver not entitled to acquire new shares—(Civil P. C. (1908), O. 40, R. 1).*

A receiver appointed in the suit cannot acquire the newly issued shares in his name. That privilege is conferred, by S. 105-C only on a person whose name is on the register of members. Where, the receiver's name is not in the register the company is not bound to entertain an application made by the receiver in his own name. A I R 1950 Bom 76, *Affirmed. R. Mathalone* v. *Bombay Life Assurance Company*,

A I R 1953 S C 385 (Supra).

(190-E) *S. 105-C—Applicability — Section, when applies.*

The section is intended to cover a case where the directors decide to increase the

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capital by issuing further shares within the authorised limit, for, it is only within that limit that the directors can decide to issue further shares, unless they are precluded from doing even that by the regulations of the company. Therefore the section becomes applicable only when the directors decide to increase capital within the authorised limit by the issue of further shares. *Nana Lal* v. *Bombay Life Assurance Co.*,

A I R 1950 S C 172=1950 S C J 337 =1950 S C R 391.

(190-F) *S. 105-C—Construction — Section, if should be liberally construed.*

Per *Das J.*, *Mukherjea J.* concurring—It is impossible to construe S. 105-C in the light of Regn. 42 in Sch. 1, Table A of the Act. The cardinal rule of interpretation of statutes is to construe its provisions literally and grammatically giving the words their ordinary and natural meaning. It is only when such a construction leads to an obvious absurdity which the Legislature cannot be supposed to have intended that the Court in interpreting the section may introduce words to give effect to what it conceives to be the true intention of the Legislature. It is not any and every inconvenience that justifies adoption of this extreme rule of construction. Section 105C literally construed is quite intelligible and may easily be applied to many cases where the further shares issued bear a uniform and round proportion. Merely because a literal construction of the section leads to inconvenient result in a particular case cannot justify the reading of the words "as nearly as circumstances admit" in the section so as to give business efficacy to it. Therefore, on a strictly literal construction of the section the directors must perforce offer all the further shares to the shareholders in proportion to their respective holdings.

Per *Mahajan J.* — Where the language of a statute in its ordinary meaning and grammatical construction leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence. Therefore, S. 105-C when it says "such shares

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shall be offered to the members" should be construed liberally, and not literally as such an interpretation would make the section workable and would not in any way affect its intent and purpose, the phrase, "such shares" meaning those shares which admit of being so offered in a business-like way. *Nana Lal* v. *Bombay Life Assurance Co.*,

A I R 1950 S C 172=1950 S C J 337 =1950 S C R 391.

(190-G) *S. 105C—Object—Time of issuing further shares—Discretion of directors —Interference by Court.*

The object of the section is to prevent discrimination amongst share-holders and prevent the directors from offering shares to outsiders before they are offered to the share holders. So long as these two requirements are complied with, the action of the directors in selecting the time when they will issue the shares as also the proportion in which they should be issued is a matter left to their discretion and it is not the province of the Court to interfere with the exercise of that discretion. This is of course subject to the general exception that the directors are not to act against the interest of the company or *mala fide*.

A company was incorporated with an authorised capital of Rs. 10 lakhs divided into 10,000 shares out of which 5404 were subscribed by 1945. In February 1945, the directors of the company issued by a resolution the remaining shares and offered them to the existing share-holders in the ratio of 4 to 5, as the shares of the company were held in multiples of five to a larger extent than in any other multiple. The result of fixing this ratio was that 272 shares remained outside the offer. In whatever other proportion the shares were offered, still a few shares were bound to remain unoffered.

Held (Per *Kania C. J.*, *Das and Mukherjea JJ.*) — That on literal construction of the section the directors had not committed any breach of the terms of S. 105C and, therefore, the issue and offer of the further shares could not be held to be illegal.

Per *Mahajan J.*—On liberal interpretation of S. 105C, it must be held that the resolution of the directors substantially complied with the provisions of the section and,

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therefore, the issue of further shares did not contravene the section. *Nana Lal* v. *Bombay Life Assurance Co.*,

A I R 1950 S C 172=1950 S C J 337 =1950 S C R 391.

(190-H) *S. 105C—Issue of further shares — Company in need of funds — Further motive to prevent strangers from intruding into affairs of company—Issue of shares, if bona fide.*

It is well established that directors of a company are in a fiduciary position *vis-a-vis* the company and must exercise their power for the benefit of the company. If the power to issue further shares is exercised by the directors not for the benefit of the company but *simply and solely* for their personal aggrandisement and to the detriment of the company, the Court will interfere and prevent the directors from doing so. The very basis of the Court's interference in such a case is the existence of the relationship of a trustee and of *cestui que trust* as between the directors and the company. If the directors exercise the power for the benefit of the company and at the same time they have a subsidiary motive which in no way affects the company or its interests or the existing share-holders then the very basis of interference of the Court is absent.

Where a company, being in need of funds, its directors decided to issue further shares and, in doing so, the directors also had another motive, namely, to prevent a certain group, who were strangers to the company, from intruding into its affairs so as to be able to assume a controlling hand in its management for their own purposes rather than for the benefit of the company :

Held (1) that the conduct of the directors could not be judged on the basis of any assumed fiduciary relationship existing between them and the group, that the directors owed no duty to the group and therefore, the motive to exclude the group could not be said to be *mala fide per se.*

(2) that, assuming that the motive to exclude the group was a bad motive, it did not prejudicially affect the company or the existing share holders and the presence of such further motive could not vitiate the

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good motive of finding the necessary funds for the company.

(3) that, therefore, the issue of further shares was *bona fide* and not illegal or void. *Nana Lal* v. *Bombay Life Assurance Co.*,

A I R 1950 S C 172 (Supra).

(190-I) *Ss. 131 (1) and 132 and Regulation 99 of Table A — Inference from — Reserve — True nature of.*

S. 131 (a) enjoins upon the Directors to attach to every balance-sheet a report with respect to the state of company's affairs and the amount, if any, which they recommend to be paid by way of dividend and the amount, if any, which they propose to carry to the Reserve Fund, General Reserve or Reserve Account. The latter section refers to the contents of the balance-sheet which is to be drawn up in the Form marked F in the III Schedule. This Form contains a separate head of reserves. The Regulation 99 of Table A, suggests that any sum out of the profits of the company which is to be made as a reserve or reserves must be set aside 'before' the Directors recommend any dividend. Thus these provisions support the conclusion as to what is the true nature of a Reserve shown in the balance-sheet. *Income-tax Commissioner* v. *Century Spinning and Manufacturing Co.*,

A I R 1953 S C 501 (503).

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See also A. I. R. 1951 S. C. 41, under Interpretation of Statutes.

(191) *Construction — Mode of—Retrospective effect.*

The powers vested in the Commission and the procedure prescribed by the Taxation on Income (Investigation Commission) Act (1947) is more comprehensive and drastic than those contained in the Income-tax Act. At the time when the impugned statute was passed there could possibly be taken no exception to its contents on the ground of constitutionality of its provisions, and the powers conferred on the commission and the procedure it was authorized to follow were well within the ambit of the Legislative power of the Central Legislature. When India became a sovereign democratic Republic on 26-1-1950 the validity of

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all laws had to be tested on the touchstone of the new Constitution and all laws made before the coming into force of the Constitution have to stand the test for their validity on the provisions of Part III of the Constitution. *Suraj Mall Mohta & Co.* v. *A. V. Viswanatha Sastri*,

A I R 1954 S C 545 (550, 551) =1954 S C J 611.

(192) *Interpretation of — Mode of.*

In interpreting the provisions of our Constitution, we should do so by the plain words used by the Constitution-makers and the importing of expressions like 'police power' which is a term of variable and indefinite connotation in American law, can only make the task of interpretation more difficult. *State of West Bengal* v. *Subodh Gopal Bose*,

A I R 1954 S C 92=1954 S C J 127 =1954 S C R 587.

(193) *Interpretation — To be liberally construed—Exceptions.*

A constitution has to be liberally construed so as to advance the concept of the right, guaranteed by it. But where there is a deliberate choice of the language used, and where it is not unlikely that having regard to the goal that the Constitution has set to itself in Part IV certain degree of caution and restraint may well have been intended as to the limits of the right, the intendment of the language used has to prevail. *State of West Bengal* v. *Subodh Gopal Bose*,

A I R 1954 S C 92 (118) =1954 S C J 127=1954 S C R 587.

(194) *Construction—Provisions dealing with fundamental rights.*

The provisions in the Constitution touching fundamental rights must be construed broadly and liberally in favour of those on whom the rights have been conferred. *Dwarkadas Shrinivas* v. *The Sholapur Spinning & Weaving Co. Ltd.*,

A I R 1954 S C 119 (138) =1954 S C J 175=1954 S C R 674.

(195) *Preambles — Value and importance of—Constitutional and fundamental rights — Accused in criminal trial cannot waive them.*

In a criminal prosecution it is not open to an accused person to waive his constitutional right and get convicted. The doctrine of waiver enunciated by some American Judges in construing the American Constitution cannot be introduced in our Constitution without a fuller discussion of the matter. The rights described as fundamental rights are a necessary consequence of the declaration in the preamble that the people of India have solemnly resolved to constitute India into a sovereign democratic republic and to secure to all its citizens justice, social, economic and political; liberty of thought, expression, belief, faith and worship; equality of status and of opportunity. These fundamental rights have not been put in the Constitution merely for individual benefit, though ultimately they come into operation in considering individual rights. They have been put there as a matter of public policy & the doctrine of waiver can have no application to provisions of law which have been enacted as a matter of constitutional policy. Reference to some of the Articles, inter alia, Arts. 15 (1), 20, 21 makes the proposition quite plain. A citizen cannot get discrimination by telling the State "you can discriminate" or get convicted by waiving the protection given under Arts. 20 and 21. *Behram Khurshid* v. *State of Bombay*,

A I R 1955 S C 123.

(196) *Preamble — Interpretation.*

If the language of an Article of the Constitution is plain and unambiguous and admits of only one meaning then the duty of the Court is to adopt that meaning irrespective of the inconvenience that such a construction may produce. If however, two constructions are possible, then the Court must adopt that which will ensure smooth and harmonious working of the Constitution and eschew the other which will lead to absurdity or give rise to practical inconvenience or make well-established provisions of existing law nugatory. *The State of Punjab* v. *Ajaib Singh*,

A I R 1953 S C 10.

(197) *Preamble—Interepretation—Spirit of Constitution when can be looked into.*

Per *Mahajan and Das JJ.* — It is well-settled that recourse cannot be had to the spirit of the Constitution when its provisions are explicit in respect of a certain right or matter. When the fundamental law has not limited either in terms or by necessary implication the general powers conferred on the legislature it is not possible to deduce a limitation from something supposed to be inherent in the spirit of the Constitution.

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The spirit of the Constitution cannot prevail as against its letter. *State of Bihar* v. *Kamleshwar Singh*

A I R 1952 S C 252
=1952 S C R 889=1952 S C J 354.

(198) *Preamble—Construction of.*

If two constructions are possible, the Court should adopt that which will stultify the apparent intention of the makers of the Constitution. *State of Bihar* v. *Kamleshwar Singh*

A I R 1952 S C 252
=1952 S C R 889=1952 S C J 354.

(199) *Preamble—Interpretation—Analogous provision in Constitution of another country whether can be good guidance.*

Per *B. K. Mukherjea J.* — When the same words are not used, it is against the ordinary canons of construction to interpret a provision in the Constitution of India in accordance with the interpretation put upon a somewhat analogous provision in the Constitution of another country, where not only the language is different, but the entire political conditions and constitutional set-up are dissimilar. *Gopalan* v. *State of Madras*

A I R 1950 S C 27=1950 S C J 174
=1950 S C R 88.

(199-A) Art. 13.

See also A. I. R. 1952 S. C. 75 under Art. 14.

(200) *Arts. 13 (1), 245 and 246—"Void" in Art. 13 (1)—Meaning of—Effect of declaration of voidness of statute—Declaration of unconstitutionality brought about by lack of legislative power—Effect of.*

The word "void" in Art. 13 (1) so far as existing laws were concerned, cannot be held to obliterate them from the statute book, and could not make such laws void altogether, because Art. 13, has not been given any retrospective effect. After the coming into force of the Constitution however the effect of Art. 13 (1) on such repugnant laws is that it nullifies them and makes them ineffectual and nugatory and devoid of any legal force or binding effect. The American rule that if a statute is repugnant to the Constitution the statute is void from its birth, has no application to cases concerning obligations incurred or rights accrued in accordance with an existing law that was constitutional in its inception but that if any law was made after the 26th January 1950 which was repugnant to

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the Constitution, then the same rule shall have to be followed in India as followed in America. The result therefore is that part of the section of an existing law which is unconstitutional is not law, and is null and void. For determining the rights and obligations of citizens the part declared void should be normally taken to be obliterated from the section for all intents and purposes, though it may remain written on the statute book and be a good law when a question arises for determination of rights and obligations incurred prior to 26th January 1950 and also for the determination of rights of persons who have not been given fundamental rights by the Constitution. Thus in this situation, there is no scope for introducing terms like "relatively void" coined by American Judges in construing a Constitution which is not drawn up in similar language and the implications of which are not quite familiar in this country. A I R 1951 S C 128, Ref.

A declaration of unconstitutionality brought about by lack of legislative power does not stand on a different footing from a declaration of unconstitutionality brought about by reason of abridgement of fundamental rights. It is not a correct proposition that constitutional provisions in Part III of the Constitution merely operate as a check on the exercise of legislative power. It is axiomatic that when the law-making power of a State is restricted by a written fundamental law, then any law enacted and opposed to the fundamental law is in excess of the legislative authority and is thus a nullity. Both these declarations of unconstitutionality go to the root of the power itself and there is no real distinction between them. They represent but two aspects of want of legislative power. The Legislative power of Parliament and the State legislatures as conferred by Arts. 245 and 246 of the Constitution stands curtailed by the fundamental rights chapter of the Constitution. A mere reference to the provisions of Art. 13 (2) and Arts. 245 and 246 is sufficient to indicate that there is no competency in Parliament or a State Legislature to make a law which comes into clash with Part III of the Constitution after the coming into force of the Constitution. The authority conferred by Arts. 245 and 246 to make laws subjectwise in the different legislatures is qualified by the declaration made in Art.

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13 (2). That power can only be exercised subject to the prohibition contained in Art. 13 (2). *Behram Khurshid* v. *State of Bombay*

A I R 1955 S C 123.

(201) *Art. 13 — Fundamental right— Duty of Court.*

Per *Bose J.* — The fundamental rights conferred by the Constitution are not absolute. They are limited. In some cases the limitation is imposed by the Constitution itself. In others Parliament has been given the power to impose further restrictions and in doing so to confer authority on the executive to carry its purpose into effect. But in every case it is the rights which are fundamental, not the limitations; and it is the duty of the Supreme Court and of all Courts in the land to guard and defend these rights jealously. It is the duty and privilege of the Supreme Court to see that rights which were intended to be fundamental are kept fundamental and to see that neither the Parliament nor the executive exceed the bounds within which they are confined by the Constitution when given the power to impose a restricted set of fetters on these freedoms; and in the case of the executive to see further that it does not travel beyond the powers conferred by Parliament. *Ram Singh* v. *State of Delhi*,

A I R 1951 S C 270 = 1951 S C R 451 = 1951 S C J 371.

(202) *Art. 13 (1) and (2) — Inclusion of cls. (1) and (2) of Art. 13 is matter of abundant caution.*

Per *Kania C. J.* — The inclusion of Cls. (1) and (2) of Art. 13 in the Constitution of India appears to be a matter of abundant caution. Even in their absence if any of the fundamental rights was infringed by any legislative enactment, the Court has always the power to declare the enactment to the extent it transgresses the limits, invalid. The existence of Art. 13 (1) and (2) in the Constitution of India, therefore is not material for the decision of the question what fundamental right is given and to what extent it is permitted to be abridged by the Constitution itself. *Gopalan* v. *State of Madras*,

A I R 1950 S C 27 = 1950 S C J 174 = 1950 S C R 88.

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(203) *Art. 13 (1) — Interpretation — Spirit of Constitution — Interpretation of Statutes — Civil P. C. (1908), Pre.*

Per *Kania C. J., Patanjali Sastri, Das & Chandrasekhara Aiyar JJ.* — A Court of law has to gather the spirit of the Constitution from the language of the Constitution. What one may believe or think to be the spirit of the Constitution cannot prevail if the language of the Constitution does not support that view. The idea of the preservation of past inchoate rights or liabilities & pending proceedings to enforce the same is not foreign or abhorrent to the Constitution of India. The Court should construe the language of Art. 13 (1) according to the established rules of interpretation & arrive at its true meaning uninfluenced by any assumed spirit of the Constitution. *Keshavan* v. *State of Bombay*,

A I R 1951 S C 128 = 1951 S C J 182 = 1951 S C R 228.

(204) *Art. 13 (1)—Retrospective operation — Pending proceedings under Press (Emergency Powers) Act (1931).*

Per *Kania C. J., Patanjali Sastri, Mahajan, Das & Chandrasekhara Aiyar JJ.*: (*Fazl Ali & Mukherjea JJ.* Contra)— Before the Constitution came into force, there was no such thing as fundamental right. As the fundamental rights became operative only & from the date of the Constitution the question of the inconsistency of the existing laws with those rights must necessarily arise on & from the date those rights come into being. Therefore Art. 13 (1) can have no retrospective operation but is wholly prospective. If an act was done before the commencement of the Constitution in contravention of the provisions of any law which, after the Constitution, becomes void, with respect to the exercise of any of the fundamental rights, the inconsistent law is not wiped out so far as the past act is concerned. Hence proceedings under S. 18 (1), Press (Emergency Powers) Act 1931, pending at the date of the Constitution are not affected.

Per *Fazl Ali & Mukherjea JJ.*—Article 13 (1) will have no retrospective operation, & transactions which are past & closed & rights which have already vested will remain untouched. But with regard to inchoate matters which were still not determined when the Constitution came into force, & as regards proceedings whether not

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yet begun or pending at the time of the enforcement of the Constitution & not yet prosecuted to a final judgment, a law which has been declared by the Constitution to be completely ineffectual can no longer be applied. *Keshavan* v. *State of Bombay*,

A I R 1951 S C 128 = 1951 S C J 182 = 1951 S C R 228.

(205) *Art. 13 (1)—Scope.*

Article 13 (1) does not necessarily make the whole statute invalid even after the advent of the Constitution. It invalidates only those provisions which are inconsistent with the fundamental rights guaranteed under Part III of the Constitution. *Habeeb Mohamed* v. *The State of Hyderabad*,

A I R 1953 S C 287.

(206) *Arts. 13 (1) and 19 (1) — Citizen not possessed of fundamental right — He cannot claim relief under Art. 13 (1).*

It is in relation to the freedom guaranteed in Art. 19 (1) of the Constitution to the citizen that the provisions of Art. 13 (1) come into play. The Article does not declare any law void independently of the existence of the freedoms guaranteed by Part III. A citizen must be possessed of a fundamental right before he can ask the Court to declare a law which is inconsistent with it void; but if a citizen is not possessed of the right, he cannot claim this relief. *D. K. Nabhirajiah* v. *State of Mysore*,

A I R 1952 S C 339=1952 S C R 744 =1952 S C J 490.

(207) *Articles 13, 14 — Applicability— Two different statutes of different authorities — Difference in dearness allowances of Central and State Government Servants —Validity—(Fundamental Rules, R. 44).*

The power of the Court to declare a law void under Art. 13 has to be exercised with reference to the specific legislation which is impugned. It is conceivable that when the same legislature enacts two different laws but in substance they form one legislation, it might be open to the Court to disregard the form and treat them as one law and strike it down, if in their conjunction they result in discrimination. But such a course is not open where the two laws sought to be read in conjunction are by different Governments and by different legislatures. Article 14 does not authorise the striking down of a law of one State on the ground that in contrast with a law of another State on the same subject its provisions are discriminatory. Nor does it contemplate a law of the Centre or of the State dealing with similar subjects being held to be unconstitutional by a process of comparative study of the provisions of the two enactments. The source of authority for the two statutes being different, Art. 14 can have no application.

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Held that the scale of dearness allowance recommended by the Central Pay Commission and sanctioned by the Central Government could furnish no ground for holding that the scale of dearness allowance recommended by the Pay Committee and adopted by the State Government by the impugned resolution, was repugnant to Art. 14.

Held further that it may no doubt sound hard that Government Servants doing work of a similar kind and working, it may be, even in the same place, should receive different allowances; but the rights of the parties have to be decided on legal considerations, and it was impossible to hold that the Resolution in question was bad under Art. 14. *The State of Madhya Pradesh* v. *G. C. Mandawar*,

A I R 1954 S C 493 (496) =1954 S C J 503.

(208) *Arts. 13 (1), 19 and 32 — Applicability — Kairana Municipality — Bye-laws, 2 and 4 — Validity of — Order of Municipality prohibiting person from carrying on trade within Municipal limits — Application under Art. 32 for enforcement of fundamental right of trade — Municipalities—U. P. Municipalities Act (II [2] of 1916), Ss. 298 and 318.*

The petitioner was carrying on wholesale business in vegetables in the municipal limits of the town of Kairana in U. P. Subsequently the municipality framed certain bye-laws under S. 298, U. P. Municipalities Act. Bye-law 2 provided that no person shall establish a market for wholesale transactions in vegetables except with the permission of the Board. There was however no bye-law authorising the Board to issue the necessary licence. Further, bye-law 4 provided for the grant of a monopoly to a contractor to deal in wholesale transactions at the place fixed as a market. Acting upon this provision the Board granted a monopoly to one *H* to carry on the wholesale business at a place fixed as a market. The result was that the Board became powerless to grant licence to the petitioner to carry on the business within the municipal limits and

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it actually refused an application of the petitioner in that behalf on the ground that there was no bye-law under which the Board could grant the licence. The petitioner who was thus completely prohibited from carrying on his business filed an application under Art. 32 of the Constitution for enforcement of his fundamental right to carry on his trade guaranteed by Art. 19 (1) of the Constitution :

Held, that the prohibition in bye-law 2, in the absence of any provision for issuing licence, became absolute and further the restrictions placed on the petitioner by bye-law 4 were more than reasonable restrictions as are contemplated by Art. 19 (6) and, therefore, the bye-laws would be void under Art. 13 (1) of the Constitution.

Held further, that though the existence of an adequate legal remedy is to be taken into consideration in the matter of granting prerogative writs, the powers given to the Supreme Court under Art. 32 are much wider and are not confined to issuing prerogative writs only. Moreover, the remedy of appeal under S. 318, U. P. Municipalities Act, was not an adequate legal remedy in the circumstances of the case. The petitioner was therefore entitled to the relief prayed for under Art. 32. *Rashid Ahmed* v. *Muncipal Board, Kairana*,

A I R 1950 S C 163=1950 S C J 124 =1950 S C R 566.

(209) *Arts. 13 and 245—Constitutionality of legislation—Duty of Court—Ultra vires — Duty of Court.*

In order to decide whether a particular legislation is unconstitutional as offending the provisions of the Constitution it is necessary to examine with some strictness the substance of the legislation for the purpose of determining what it is that the legislature has really done; the Court, when such questions arise, is not overpersuaded by the mere appearance of the legislation. In relation to constitutional prohibitions binding a legislature it is clear that the legislature cannot disobey the prohibitions merely by employing indirect method of achieving exactly the same result. Therefore, in all such cases the Court has to look behind the names, forms and appearances to discover the true character and nature of the legislation. *Dwarkadas Shrinivas*

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v. *The Sholapur Spinning & Weaving Co. Ltd.*,

A I R 1954 S C 119 (123) =1954 S C R 674=1954 S C J 175.

(210) *Articles 13 and 19 (1) (g) and (6) — Presumption as to validity of legislation — Burden of proof.*

There is undoubtedly a presumption in favour of the Constitutionality of a legislation. But when the enactment on the face of it is found to violate a fundamental right guaranteed under Article 19 (1) (g) of the Constitution, it must be held to be invalid unless those who support the legislation can bring it within the purview of the exception laid down in clause (6) of the article. *Saghir Ahmad* v. *State of U. P.*

A I R 1954 S C 728 (738) =1954 S C J 819.

(211) *Arts. 13, 14 — Applicability — Two different statutes of different authorities — Difference in dearness allowances of Central and State Government Servants —Validity—(Fundamental Rules, R. 44).*

The power of the Court to declare a law void under Art. 13 has to be exercised with reference to the specific legislation which is impugned. It is conceivable that when the same legislature enacts two different laws but in substance they form one legislation, it might be open to the Court to disregard the form and treat them as one law and strike it down, if in their conjunction they result in discrimination. But such a course is not open where the two laws sought to be read in conjunction are by different Governments and by different legislatures. Art. 14 does not authorise the striking down of a law of one State on the ground that in contrast with a law of another State on the same subject its provisions are discriminatory. Nor does it contemplate a law of the Centre or of the State dealing with similar subjects being held to be unconstitutional by a process of comparative study of the provisions of the two enactments. The sources of authority for the two statutes being different, Art. 14 can have no application.

Held that the scale of dearness allowance recommended by the Central Pay Commission and sanctioned by the Central Government could furnish no ground for holding that the scale of dearness allowance recommended by the Pay Committee and adopted

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by the State Government by the impugned resolution, was repugnant to Art. 14.

Held further that it may no doubt sound hard that Government servants doing work of a similar kind and working, it may be, even in the same place, should receive different allowances; but the rights of the parties have to be decided on legal considerations, and it was impossible to hold that the Resolution in question was bad under Art. 14. *State of M. P.* v. *G. C. Mandawar*, A I R 1954 S C 493.

(212) *Arts. 13, 14 — Trial under Hyderabad Special Tribunals Regulation (5 of 1358F).*

(Per *Majority; Bose and Ghulam Hasan JJ. Contra)* — Trial commenced under Special Tribunals Regulation (5 of 1358F) before coming into force of the Constitution — Proceedings before commencement of Constitution cannot be challenged on ground of discrimination — Validity of subsequent proceedings depends on question as to whether accused has been deprived of equal protection in matters of procedure and it is incumbent upon Court to consider, firstly, whether the discriminatory or unequal provisions of law could be separated from the rest and even without them a fair measure of equality in the matter of procedure could be secured to the accused. In the second place, it has got to consider whether the procedure actually followed did or did not proceed upon the basis of the discriminatory provision — A mere threat or possibility of unequal treatment is not sufficient—*Held* that although there were deviations in certain particulars, the accused had substantially the benefit of a normal trial in this case: A. I. R. 1951 S. C. 128, *Rel. on.*; A. I. R. 1952 S. C. 75 and A. I. R. 1952 S. C. 235, *Distinguished. Qasim Razvi* v. *State of Hyderabad*,

A I R 1953 S C 156.

(213) *Art. 13 — Constitutionality of statute— Power of Court to examine.*

The Constitution of India contains express provisions for judicial review of legislation as to its conformity with the Constitution, unlike in America where the Supreme Court has assumed extensive powers of reviewing legislative acts under cover of the widely interpreted "due process" clause in the Fifth and Fourteenth Amendments. If, then, the Courts in India face up

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to such important and none too easy task, it is not out of any desire to tilt at legislative authority in a crusader's spirit but in discharge of a duty plainly laid upon them by the Constitution. This is especially true as regards the "fundamental rights", as to which the Supreme Court has been assigned the role of a sentinel on the 'qui vive.' While the Court naturally attaches great weight to the legislative judgment, it cannot desert its own duty to determine finally the constitutionality of an impugned statute. *The State of Madras* v. *V. G. Row.*

A I R 1952 S C 196=1952 S C R 597=1952 S C J 253.

(214) *Arts. 13, 368—"Law," in Art. 13 whether includes amendments made in Constitution of India under Art. 368— Function of Constitutional law.*

Although "law" must ordinarily include constitutional law, there is a clear demarcation between ordinary law which is made in exercise of legislative power, and constitutional law, which is made in exercise of constituent power. The Constitutional law is mainly concerned with the creation of the three great organs of the State, the executive, the legislature and the judiciary, the distribution of governmental power among them and the definition of their mutual relation. No doubt our Constitution makers have incorporated certain fundamental rights in Part III and made them immune from interference by laws made by the State. However, it is difficult, in the absence of a clear indication to the contrary, to suppose that they also intended to make those rights immune from constitutional amendment. The terms of Art. 368 are perfectly general and empower Parliament to amend the Constitution without any exception whatever. Had it been intended to save the fundamental rights from the operation of that provision, it would have been perfectly easy to make that intention clear by adding a proviso to that effect. Thus, there are two articles each of which is widely phrased, but conflicts in its operation with the other. Harmonious construction requires that one should be read as controlled and qualified by the other. Therefore, in the context of Art. 13 "law" must be taken to mean rules or regulations made in exercise of ordinary legislative power and not amendments to the Constitution made in exercise of constituent power, with the result that

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Art. 13 (2) does not affect amendments made under Art.368. *Shankari Prasad* v. *Union of India.*

A I R 1951 S C 458=1951 S C J 775=1952 S C R 89.

(214A) **Art. 14.**

See also A I R 1953 S C 10 Under Abducted Persons (Recovery & Restoration) Act.

Act, 1949 (Act LXV of 1949).

(2) A I R 1953 S C 156 Under Art. 13 Supra.

(3) A I R 1953 S C 384 Under Articles 15 and 32.

(4) A I R 1951 S C 318 Under Bombay Prohibition Act, S. 39.

(5) A I R 1953 S C 210 Under Constitution of India, Art. 311.

(6) A I R 1954 S C 73 Under Industrial Disputes.

(7) A I R 1954 S C 139 Also Under Orissa Estates Abolition Act, 1951 (Orissa Act 1 of 1952), S. 3.

(8) A I R 1954 S C 229 Under Influx from Pakistan (Control) Act, (23 of 1949).

(9) A I R 1953 S C 394 Under Part 'C' States (Laws) Act (1950), S. 4.

(10) A I R 1954 S C 314 Under Penal Code.

Applicability.
Construction.
Scope.
Discriminatory Legislation.
Question of Constitutionality.
Reasonable Restriction.

(215) *Art. 14—Applicability— Legislation enacted for achieving certain object need not be all embracing.*

Legislation enacted for the achievement of a particular object or purpose need not be all embracing. It is for the Legislature to determine what categories it would embrace within the scope of legislation and merely because certain categories would embrace within the scope of legislation and merely because certain categories which would stand on the same footing as those which are covered by the legislation are lett out would not render legislation which has been enacted in any manner discriminatory and violative of the fundamental right

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guaranteed by Art. 14, *Sukhawant Ali* v. *State of Orissa.*

A I R 1955 S C 166.

(216) *Art. 14 — Application of—Doctrinaire approach should be avoided.*

In applying the dangerously wide and vague language of the equality clause to the concrete facts of life, a doctrinaire approch should be avoided. *Lakshman Dass* v. *State of Bombay.*

A I R 1952 S C 235 =1952 S C R 710=1952 S C J 339.

(217) *Art. 14—Construction — Doctrinaire approach.*

Per *Fazl Ali J.* — Article 14 lays down an important fundamental right, which should be closely and vigilantly guarded, but, in construing it, the Court should not adopt a doctrinaire approach which might choke all beneficial legislation. *Charanjit Lal* v. *Union of India,*

A I R 1951 S C 41 =1950 S C R 869.

(218) *Art. 14.—Scope and effect of.*

While Art. 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation. In order, however, to pass the test of permissible classification two conditions must be fulfilled, namely, (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and (ii) that that differentia must have a rational relation to the object sought to be achieved by the statute in question. The classification may be founded on different bases; namely geographical, or according to objects or occupations or the like. What is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration. Art. 14 condemns discrimination not only by a substantive law but also by a law of procedure. *Case Law, Ref. Budhan Chaudhary* v. *State of Bihar,*

A I R 1955 S C 191.

(219) *Art. 14—Scope—Equal protection both as regards substantive and procedural laws guaranteed by the Article.*

Article 14 guarantees to all persons the right of equality before the law and equal protection of the laws within the territory of India. This article not only guarantees equal protection as regards substantive laws but procedural laws also come within its

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ambit. The implication of the Article is that all litigants similarly situated are entitled to avail themselves of the same procedural rights for relief, and for defence with like protection and without discrimination. *Shree Meenakshi Mills Ltd., Madurai* v. *A. V. Visvanatha Sastri*

A I R 1955 S C 13.

(220) *Art. 14 — Scope — Retrospective effect of the article.*

When an Act is valid in its entirety before the date of the Constitution, the part of the proceedings regulated by the special procedure and taken during pre-Constitution period cannot be questioned however discriminatory it may have been, but if the discriminatory procedure is continued after the date of the Constitution, then a person prejudicially affected by it can legitimately ask why he is now being differently treated from others similarly situate. A I R 1951 S C 128; A I R 1952 S C 235; A I R 1953 S C 156; A I R 1953 S C 287, *Foll. Meenakshi Mills* v. *Visvanatha Sastri*,

A I R 1955 S C 13.

(221) *Art. 14 — Scope — Notification violating Art. 14 issued before Constitution —Trial under Notification not concluded before coming into force of Constitution— Accused prejudiced by trial conducted under procedure prescribed by notification.*

Trial was held vitiated by reason of Art. 14. (Moreover trial was vitiated because the notification which authorised it also travelled beyond the powers conferred on the State Government by S. 269 (1) of the Code of Criminal Procedure). *Dhirendra Kumar* v. *Superintendent and Remembrancer of Legal Affairs to the Government of West Bengal*,

A I R 1954 S C 424 (428)= 1954 S C J 582.

(222) *Art. 14—Scope of—Retrospective effect.*

The Constitution has no retrospective effect and even if the law is in any sense discriminatory, it must be held to be valid for all past transactions and for enforcement of rights and liabilities accrued before the coming into force of the Constitution. *Habeeb Mohamed* v. *The State of Hyderabad*,

A I R 1953 S C 287,

(223) *Art. 14—Scope of equal protection.*

A legislature which must, of necessity, have the power of making special laws to attain particular objects must have large

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powers of selection or classification of persons and things upon which such laws are to operate. Hence mere differentiation or inequality of treatment does not per se amount to discrimination, and it is necessary to show that the selection or differentiation is unreasonable or arbitrary and that it does not rest on any rational basis having regard to the object which the legislature has in view in order to invalidate an enactment under Art. 14. *Ammerunisa* v. *Mehboob Begum*,

A I R 1953 S C 91 =1953 S C R 404=1953 S C J 61

(224) *Art. 14 — Scope — Retrospective effect.*

There can be no question of infringement of the fundamental right under Art. 14 before the coming into force of the Constitution as the provisions of the Constitution relating to fundamental rights have no retrospective operation : AIR 1951 S. C. 128, *Foll. Lakshman Dass* v. *State of Bombay*,

A I R 1952 S C 235 =1952 S C R 710=1952 S C J 339

(225) *Arts. 14, 15, 16 and 21 — Scope — Discriminate against, meaning of.*

Per *Patanjali Sastri C. J.* — All legislative differentiation is not necessarily discriminatory. In fact, the word "discrimination" does not occur in Art. 14. The expression "discriminate against" is used in Art. 15 (1) and Art. 16 (2), and it means, according to the Oxford Dictionary, "to make an adverse distinction with regard to; to distinguish unfavourably from others." Discrimination thus involves an element of unfavourable bias and it is in that sense that the expression has to be understood in this context. If such bias is disclosed and is based on any of the grounds mentioned in Arts. 15 and 16, it may well be that the statute will, without more, incur condemnation as violating a specific constitutional prohibition unless it is saved by one or other of the provisos to those articles. But the position under Art. 14 is different. Equal protection claims under that article are examined with the presumption that the State action is reasonable and justified. This presumption of constitutionality stems from the wide power of classification which the legislature must of necessity, possess in making laws operating differently as regards different groups of persons in order to give effect to its policies. The power of the State to regulate criminal trials by constituting different

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Courts with different procedures according to the needs of different parts of its territory is an essential part of its police power. Though the differing procedures might involve disparity in the treatment of the persons tried under them, such disparity is not by itself sufficient to outweigh the presumption and establish discrimination unless the degree of disparity goes beyond what the reason for its existence demands as, for instance, when it amounts to a denial of a fair and impartial trial. It is, therefore, not correct to say that Art. 14 provides no further constitutional protection to the personal liberty than what is afforded by Art. 21. Notwithstanding that its wide general language is greatly qualified in its practical application by a due recognition of the State's necessarily wide powers of legislative classification Art. 14 remains an important bulwark against discriminatory procedural laws.

Per *Mukherjee J.*—A legislature for the purpose of dealing with the complex problems that arise out of an infinite variety of human relations, cannot but proceed upon some sort of selection or classification of persons upon whom the legislation is to operate. The consequences of such classification would undoubtedly be to differentiate the persons belonging to that class from other, but that by itself would not make the legislation obnoxious to the equal protection clause. Equality prescribed by the constitution would not be violated if the statute operates equally on all persons who are included in the group and the classification is not arbitrary or capricious, but bears a reasonable relation to the objective which the legislation has in view. The legislature is given the utmost latitude in making the classification and it is only when there is a palpable abuse of the power and the differences made have no rational relation to the objectives of the regulation that necessity of judicial interference arises.

If the legislative policy is clear and definite and as an effective method of carrying out that policy a discretion is vested by the statute upon a body of administrators or officers to make selective application of the law to certain classes or groups of persons, the statute itself cannot be condemned as a piece of discriminatory legislation. In such cases, the power given to the executive body would import a duty on it to classify the

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subject-matter of legislation in accordance with the objective indicated in the statute. The discretion that is conferred on official agencies in such circumstances is not an unguided discretion; it has to be exercised in conformity with the policy to effectuate which the direction is given and it is in relation to that objective that the property of the classification would have to be tested. If the administrative body proceeds to classify persons or things on a basis which has no rational relation to the objection of the Legislature, its action can certainly be annulled as assuming against the equal protection clause. On the other hand, if the statute itself does not disclose a policy or objective and it confers authority on another to make selection at its pleasure, the statute would be held on the face of it to be discriminatory irrespective of the way in which it is applied. *Kick Wo* v. *Hopkin*, (1886) 118 U. S. 356, *Ref.*

Das J.—While Art. 14 forbids class legislation it does not forbid reasonable classification for the purposes of legislation. In order, however, to pass the test of permissible classification, two conditions must be fulfilled, namely, (1) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and (2) that that differentia must have a rational relation to the object sought to be achieved by the Act. What is necessary is that there must be a nexus between the basis of classification and the object of the Act. *Kathi Raning* v. *State of Saurashtra*, **A I R 1952 S C 123 =1952 S C R 435=1952 SCJ 168**

(226) *Art. 14— Discriminatory legislation — Taxation on Income (Investigation Commission) Act (30 of 1947), S. 5 (1)— Drastic procedure—No special or rational nexus — Section is discriminatory and invalid.*

The class of persons alleged to have been dealt with by Section 5 (1) of the Taxation on Income (Investigation Commission) Act was comprised of those unsocial elements in society who during recent years prior to the passing of the Act had made substantial profits and had evaded payment of tax on those profits and whose cases were referred to the Investigation Commission before 1.9.1948. Assuming that evasion of tax to a substantial amount could form a basis of classifica-

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tion at all for imposing a drastic procedure on that class, the inclusion of only such of them whose cases had been referred before 1-9-1948 into a class for being dealt with by the drastic procedure, leaving other tax evaders to be dealt with under the ordinary law will be a clear discrimination for the reference of the case within a particular time has no special or rational nexus with the necessity for drastic procedure. Assuming the provisions of S. 5 (1) of Act 30 of 1947 can be saved from the mischief of Art. 14 of the Constitution on the basis of a valid classification, that defence is no longer available in support of it after the introduction by Act 34 of 1954 of the new sub-section (1A) in S. 34 of the Income-tax Act, which sub-section is intended to deal with the same class of persons dealt with by S. 5 (1) of Act 30 of 1947. Hence the proceedings before the Investigation Commission can no longer be continued under the procedure prescribed by Act 30 of 1947. *Shree Meenakshi Mills Ltd., Madurai* v. *A. V. Visvanatha Sastri,*

A I R 1955 S C 13.

(227) *Art. 14 — Discriminatory legislation—"Taxation on Income (Investigation Commission) Act (1947), S. 5 (4)" — Validity of—Income-tax Act (1922), S. 34.*

It is well settled that in its application to legal proceedings Art. 14 assures to everyone the same rules of evidence and modes of procedure; in other words, the same rule must exist for all in similar circumstances. It is also well settled that this principle does not mean that every law must have universal application for all persons who are not by nature, attainment or circumstance, in the same position. The State can by classification determine who should be regarded as a class for purposes of legislation and in relation to a law enacted on a particular subject, but the classification permissible must be based on some real and substantial distinction bearing a just and reasonable relation to the objects sought to be attained and cannot be made arbitrarily and without any substantial basis. Classification means segregation in classes which have a systematic relation, usually found in common properties and characteristics.

On no principle of construction of statutes can the words "to a substantial extent" occurring in S. 5 (1) be read in sub-clause (a) of S. 5 (4). On a plain reading of

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the section it is clear that sub-section (4) is not limited only to persons who made extraordinary profits and to a substantial extent evaded payment of taxation on income, irrespective of whether the evaded profits are substantial or insubstantial. The scope of S. 5 (4) is different from the scope of S. 5 (1) both in its extent and range. It is not necessarily limited to profits made within any particular period and brings within its range all persons, whether traders, businessmen, professional people, whoever they may be, who may have at any time evaded payment of taxation on income for whatever cause.

That being the true scope or construction of sub-section (4), it obviously deals with the same class of persons who fall within the ambit of S. 34 of the Income-tax Act and are dealt with in sub-s. (1) of that section and whose income can be caught by proceeding under that section. Assessees who have failed to disclose fully and truly all material facts necessary for the assessment under S. 34 can be equated with persons who are discovered in the course of the investigation conducted under S. 5 (1) to have evaded payment of income-tax on their incomes. The result is that some of these persons can be dealt with under the provisions of Act XXX of 1947, at the choice of the Commission, though they could also be proceeded with under the provisions of S. 34 of the Income-tax Act.

It is not possible to hold that all such persons who evade payment of income-tax and do not truly disclose all particulars or material facts necessary for their assessment and against whom a report is made under sub-s. (4) of S. 5 of the impugned Act by themselves form a class distinct from those who evade payment of income-tax and come within the ambit of S. 34 of the Income-tax Act. There is nothing uncommon either in properties or in characteristics between persons who are discovered as evaders of income-tax during an investigation conducted under S. 5 (1) and those who are discovered by the Income-tax Officer to have evaded payment of income-tax. Both these kinds of persons have common properties and have common characteristics and therefore require equal treatment. Both S. 34 of the Income-tax Act and sub-s. (4) of S. 5 of the impugned Act deal with all persons who have similar characteristics and

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similar properties, the common characteristics being that they are persons who have not truly disclosed their income and have evaded payment of taxation on income.

If persons dealt with by the impugned Act are deprived of the substantial and valuable privileges which they would otherwise have if they were dealt with under the Income-tax Act, in that situation it is no defence to say that the discriminatory procedure also advances the course of justice. The matter has to be judged from the point of view of the ordinary reasonable man and not from the point of view of the Government.

The assessees under S. 5 (4) have been given discriminatory treatment even from those whose cases are referred to under S. 5 (1) of the Act to the Commission inasmuch as in the case of persons whose cases are referred to under S. 5 (1) of the Act it is the prima facie belief of the Government that enables the reference to be made to the Commission and the Commission has after investigation to form an opinion; while in the case of persons coming within the ambit of sub-s. (4) of S. 5 the Commission itself finds and gathers reason to believe that these persons have evaded income tax and on its report the Government is bound to refer their cases to the same Commission who has already arrived at the prima facie conclusion that they have evaded payment of income-tax. The investigator and the Judge in this situation are rolled into one. That is not so in cases coming under S. 5 (1).

The persons against whom proceedings are taken under S. 5 (4) are deprived of the rights of appeal, second appeal and revision conferred by Ss. 31, 32 and 33 of the Income-tax Act on assessees whose cases are dealt with under the procedure of S. 34 of the Income-tax. The constitution of the Commission by itself cannot be held to be a sufficient safeguard and a good substitute for the rights of appeal and second appeal and revision given by the Income-tax Act and there can thus be no doubt that the procedure prescribed by the impugned Act deprives a person who is dealt with under that Act of these valuable rights of appeal, second appeal and revision to challenge questions of fact decided by the Judge of first instance. There is thus a material and substantial difference between the two procedures, one prescribed by the impugned

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Act and the other prescribed by the Income-tax Act.

The assessee under the Income-tax Act would have a right to inspect the record and all relevant documents before he is called upon to lead evidence in rebuttal. This right has not been taken away by any express provisions of the Income tax Act but impugned Act contains a mandate in sub-s. (4) of S. 7. The little mercy shown under the proviso to S. 7 (4) to the person whose case is being investigated by the Commission is no substitute for the fullest right of inspection which under ordinary law and the Code of Civil Procedure and in a judicial proceeding a person would have in order to meet the case made against him. The procedure thus prescribed in this matter by the impugned Act is substantially prejudicial to the assessee than the procedure prescribed under the Income-tax Act.

Again, so far as the procedure for reference under sub-s. (4) of S. 5 is concerned, it is also to a certain extent prejudicial to the assessee. There is no doubt that there is in this matter in the first stages some similarity in the procedure to be followed for catching evaded income both under S. 34 of the Income-tax Act and under the provisions of sub-s. (4) of S. 5 of the impugned Act; but the overall picture is that though under the Income-tax Act the same officer who first arrives at a tentative conclusion hears and decides the case, his decision is not final but is subject to appeal, while under the provisions of sub-s. (4) of S. 5 the decision of the Commission tentatively arrived at in the absence of the assessee becomes final when taken in his presence, and that makes all the difference between the two procedures.

It may also be pointed out that under the provisions of S. 34 of the Income-tax Act investigation into escaped income or evaded income is limited to a maximum period of eight years, while under the provisions of sub-s. (4) of S. 5 it is not limited to any period and this certainly operates to the detriment of those dealt with under sub-s. (4) of S. 5 of the impugned Act, and those dealt with under S. 34 of the Income-tax Act.

Hence sub-s. (4) of S. 5 and the procedure prescribed by the impugned Act in so far as it affects the persons proceeded against under that sub-section being a piece of dis-

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criminatory legislation offends against provisions of Art. 14 of the Constitution and is thus void and unenforceable. *Suraj Mall Mohta & Co.* v. *A. V. Visvanatha Sastri and another,*

A I R 1954 S C 545 (552, 553, 554) =1954 S C J 611.

(228) *Art. 14 — No discrimination — Criminal Procedure Code, S. 14 — Validity of.*

Where the Special Magistrate under S. 14 of the Criminal Procedure Code has to try the case entirely under the normal procedure, no discrimination of the kind contemplated by the decision in A I R 1952 S C 75 and the other cases following it, arises. A law vesting discretion in an authority under such circumstances cannot be said to be discriminatory as such, and is therefore not hit by Art. 14 of the Constitution. *M. K. Gopalan and another* v. *The State of Madhya Pradesh,*

A I R 1954 S C 362 (363).

(229) *Art. 14 — Discriminatory legislation — Classification under S. 12 of Bombay Act (VI [6] of 1947)—Held arbitrary and void after Constitution — (Public Safety—Bombay Public Security Measures Act (VI [6] of 1947), S. 12).*

(Majority view): While Article 14 forbids class legislation it does not forbid reasonable classification for the purposes of legislation. In order, however, to pass the test of permissible classification, two conditions must be fulfilled, namely, (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others who are left out of the group and (ii) that that differentia must have a rational relation to the object sought to be achieved by the Act. What is necessary is that there must be a nexus between the basis of classification and the object of the Act.

Although the first part of S. 12 of the Bombay Act may indicate and imply a process of classification, the section, in so far as it authorises the Government to direct particular "cases" to be tried by the Special Court, does not purport to proceed upon the basis of any classification at all. Further, the supposed basis of the alleged classification, namely, the fact of reference to the Special Court before the Constitution came into effect has no reasonable relation

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to the objects sought to be achieved by the Act. If the consideration of the security of the State or the maintenance of public order requires the application of the special procedure, there is no obvious reason why it should be applied to "cases" already referred and not to cases not yet referred at the date of the Constitution. The same consideration applies equally to both categories of cases. It is, therefore, clear that there is no nexus which connects the basis on which the supposed classification is founded with the objects of the Act, for the object of the Act is wide enough to cover both categories of "cases" and hence it is not a permissible classification. *Lakshman Dass* v. *State of Bombay,*

A I R 1952 S C 235.

(230) *Arts. 14, 13 (1), 226—Discriminatory legislation — Bihar Act 34 of 1950 is invalid — Bihar Sathi Lands (Restoration) Act (34 of 1950), S. 1.*

What the equality clause aims at is to strike down hostile discrimination or oppression of inequality. As the guarantee applies to all persons similarly situated, it is certainly open to the Legislature to classify persons and things to achieve particular legislative objects; but such selection or differentiation must not be arbitrary and should rest upon a rational basis, having regard to the object which the Legislature has in view.

The Bihar Act 34 of 1950 has singled out two individuals and one solitary transaction entered into between them and another private party, namely, the Bettiah Wards Estate and has declared the transaction to be a nullity on the ground that it is contrary to the provisions of law, although there has been no adjudication on this point by any judicial tribunal. By so enacting, what the Legislature has done is singling out two individuals out of many lessees and denying them the right which every Indian citizen possesses to have his rights adjudicated upon by a judicial tribunal in accordance with the law which applies to his case. The meanest of citizens has a right of access to a Court of law for the redress of his just grievances and it is from this right that the lessees have been deprived, by this Act.

It is impossible to conceive of a worse form of discrimination that the one which differentiates a particular individual from

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all his fellow subjects and visits him with a disability which is not imposed upon anybody else and against which even the right of complaint is taken away.

The Act, therefore, comes within the mischief of Art. 14 and is declared invalid. (Writ of mandamus was issued directing the State Government not to take any steps in pursuance of the Act or to interfere with the appellant's possession): A I R 1953 S. C. 91, *Rel. on.*

Patanjali Sastri C J.—This is purely a dispute between private parties and a matter for determination by duly constituted Courts to which is entrusted, in every free and civilised society, the important function of adjudicating on disputed legal rights, after observing the well-established procedural safeguards which include the right to be heard, the right to produce witnesses and so forth. This is the protection which the law guarantees equally to all persons, and the Constitution prohibits by Art. 14 every State from denying such protection to anyone. The appellants have been denied this protection. A political organisation of the party in power decides after making such enquiry as it thought fit that the settlement in question was "contrary to the provisions of law and public policy", and the State Legislature, basing itself on such decision, purports to declare the settlement "null and void" and directs the eviction of the appellants and the restoration of the lands to the other party. Legislation such as this is calculated to drain the vitality from the Rule of Law which the Constitution so unmistakably proclaims, and it is to be hoped that the democratic process in this country will not function along these lines. *Ram Parshad* v. *State of Bihar and Orissa,*

A I R 1953 S C 215=1953 S C R 1129
=1953 S C J 267.

(231) *Art. 14 — Discriminatory legislation—Application of presumption of constitutionality of an Act — (Interpretation of Statutes — Presumption of constitutionality).*

Though the presumption is in favour of the constitutionality of a legislative enactment and it has to be presumed that a Legislature understands and correctly appreciates the needs of its own people, when on the face of a statute there is no classification at all, and no attempt has been made

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to select any individual or group with reference to any differentiating attribute peculiar to that individual or group and not possessed by other, this presumption is of little or no assistance to the State. (1897) 165 U. S. 150, *Ref. Ram Parsad* v. *State of Bihar & Orissa,*

A I R 1953 S C 215=1953 S C R 1129
=1953 S C J 267.

(232) *Arts. 14 and 13—Discriminatory legislation — West Bengal Special Courts Act (X [10] of 1950), S. 5 (1)—Validity —Discrimination in criminal trials — Classification based on speedier trial of offences—Applicability of Art. 14, Constitution of India to rule of procedure—Provision offends Art. 14 of the Constitution and is ultra vires Arts. 14 and 13.*

Per *Fazl Ali, Mahajan, Mukherjee, Chandrashekhara Aiyer and Bose JJ., Sastri C. J. Contra.*— The provisions of S. 5 (1) are *ultra vires* the Constitution by reason of their being in conflict with Art. 14 of the Constitution.

Per *Das J.*— The provision of S. 5 (1) is *ultra vires* the Constitution only so far as it allows the State Government to direct any case to be tried by the Special Court. The rest of S. 5 (1) is valid.

Per *Chandrashekhara Aiyar and Bose JJ.*— The whole Act is *ultra vires* the Constitution as it offends Art. 14 of the Constitution.

Per *Patanjali Sastri C. J.*—It is difficult to hold that S. 5 (1) in whole or in part is discriminatory : A. I. R. (39) 1952 Cal. 150 (F. B.), *Affirmed; Case law discussed.*

Per *Fazl Ali, Mahajan, Mukherjee and Chandrashekhara Aiyar JJ.*—The impugned Act has completely ignored the principle of the classification followed in the Criminal P. C. and it proceeds to lay down a new procedure without making any attempt to particularize or classify the offences or cases to which it is to apply.

The Act itself lays down a procedure which is less advantageous to the accused than the ordinary procedure, and this fact must in all cases be the root-cause of the discrimination which may result by the application of the Act.

Speedier trial of offences may be the reason and motive for the legislation but it does not amount either to a classification of offences or cases. The necessity of a speedy trial is too vague, uncertain and elusive cri-

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terion to form the basis of a valid and reasonable classification.

It is no classification at all in the real sense of the term as it is not based on any characteristics which are peculiar to persons or to cases which are to be subject to the special procedure prescribed by the Act. The mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of Art. 14. To get out of its reach it must appear that not only a classification has been made but also that it is one based upon a reasonable ground on some difference which bears a just and proper relation to the attempted classification and is not a mere arbitrary selection.

Even if it be said that the statute on the face of it is not discriminatory, it is so in its effect and operation inasmuch as it vests in the executive government unregulated official discretion and therefore has to be adjudged unconstitutional.

A rule of procedure laid down by law comes as much within the purview of Art. 14 as any rule of substantive law and it is necessary that all litigants, who are similarly situated, are able to avail themselves of the same procedural rights for relief and for defence with like protection and without discrimination.

If a legislation is discriminatory and discriminates one person or class of persons against others similarly situated and denies to the former the privileges that are enjoyed by the latter, it cannot but be regarded as "hostile" in the sense that it affects injuriously the interests of that person or class. Of course, if one's interests are not at all affected by a particular piece of legislation, he may have no right to complain. But if it is established that the person complaining has been discriminated against as a result of legislation and denied equal privileges with others occupying the same position, it is not incumbent upon him, before he can claim relief on the basis of his fundamental rights, to assert and prove that in making the law the legislature was actuated by a hostile or inimical intention against a particular person or class.

For the same reason it cannot be contended that in cases like these, the Court should enquire as to what was the dominant intention of the legislature in enacting the law and that the operation of Art. 14 would be excluded if it is proved that the

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legislature had no intention to discriminate, though discrimination was the necessary consequence of the Act. When discrimination is alleged against officials in carrying out the law a question of intention may be material in ascertaining whether the officer acted *mala fide* or not, but no question of intention can arise when discrimination follows or arises on the express terms of the law itself.

When the statute is not itself discriminatory and the charge of violation of equal protection is only against the official, who is entrusted with the duty of carrying it into operation, the equal protection clause could be availed of in such cases; but the officer would have a good defence if he could prove *bona fides*. But when the statute itself makes a discrimination without any proper or reasonable basis, the statute would be invalidated for being in conflict with the equal protection clause and the question as to how it is actually worked out may not necessarily be a material fact for consideration.

In the case of the impugned Act, the discrimination arises on the terms of the Act, itself. The fact that it gives unrestrained power to the State Government to select in any way it likes the particular cases or offences which should go to a Special Tribunal and withdraw in such cases the protection which the accused normally enjoy under the criminal law of the country, is on the face of it discriminatory.

It is not strictly correct to say that if certain specified offences throughout the State were directed to be tried by the Special Court, there could not be any infringement of the equality rule. It may be that in making the selection the authorities would exclude from the list of offences other offences of a cognate character in respect to which no difference in treatment is justifiable. In such circumstances also the law or order would be offending against the equality provision in the Constitution.

Per *Das J.*—Section 5 (1), in so far as it empowers the State Government to direct "offences" or "classes of offences" or "classes of cases" to be tried by a Special Court, by necessary implication and intendment, empowers the State Government to classify the "offences" or "classes of offences" or "classes of cases," that is to say, to make a proper classification. This part of

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the section, properly construed and understood, does not confer an uncontrolled and unguided power on the State Government. On the contrary, this power is controlled by the necessity for making a proper classification which is guided by the preamble in the sense that the classification must have a rational relation to the object of the Act as recited in the preamble. It is, therefore not an arbitrary power. Therefore, this part of S. 5 (1) is valid.

The power to direct "cases" as distinct from "classes of cases" to be tried by a Special Court contemplates and involves a purely arbitrary selection based on nothing more substantial than the whim and pleasure of the State Government and without any appreciable relation to the necessity for a speedier trial. Here the law lays an unequal hand on those who have committed intrinsically the same quality of offence. This power must inevitably result in discrimination and this discrimination is, in terms incorporated in this part of the section itself and, therefore, this part of the section itself must be held *ultra vires*. It is not a question of an unconstitutional administration of a statute otherwise valid on its face but here the unconstitutionality is writ large on the face of the statute itself.

Per *Chandrasekhara Aiyar J.*—If the Act does not enunciate any principle on the basis of which the State Government could select offences or classes of offences or cases and classes of cases and the State Government is left free to make any arbitrary selection according to their will and pleasure then the Act is void.

Per *Patanjali Sastri C. J.*— Section 5 (1) does not, either in terms or by necessary implication, discriminate as between persons or classes of persons; nor does it purport to deny to any one equality before the law or the equal protection of the laws. Indeed, it does not by its own force make the special procedure provided in the Act applicable to the trial of any offence or classes of offences or classes of cases; for it is the State Government's notification under the section that attracts the application of the procedure.

Nor is that procedure, calculated to impair the chances of a fair trial of the cases to which it may be made applicable, and no discriminatory intent or design is discernible on its face, unless every departure from the normal procedure is to be regarded as

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involving a hostile discrimination. Section 5 (1) vests a discretion in the State Government to refer to a special Court for trial of such offence or classes of offences or cases or classes of cases as may, in its opinion, require a speedier trial. Such discretion the State Government is expected to exercise honestly and reasonably, and the mere fact that it is not made subject to judicial review cannot mean that it was intended to be exercised in an arbitrary manner without reference to the declared object of the Act or whether the duration of a case is likely to be long or not. In the face of all these considerations it seems difficult to condemn S. 5 (1) as violative of Art. 14. *State of West Bengal* v. *Anwar Ali Sarkar*,

A I R 1952 S C 75=1952 S C J 55 =1952 S C R 284.

(233) *Arts. 14, 19 & 31, 32 — Question of constitutionality — Who can raise — Fundamental right of company to property — Right of share-holder to question validity of law infringing the rights.*

Per *Fazl Ali, Das and Mukherjea JJ.*— No one except those whose rights are directly affected by a law can raise the question of the constitutionality of that law.

The company and the share-holders are in law separate entities, and if the allegation is made that any property belonging to the Company has been taken possession of without compensation or the right enjoyed by the Company under Art. 19 (1) (f) has been infringed, it would be for the Company to come forward to assert or vindicate its own rights and not for any individual share-holder to do so. But so far as the violation of the equality clause in the Constitution is concerned a share-holder of the Company has as much right to complain as the company itself. *Charanjit Lal* v. *Union of India* **AIR 1951 S C 41 =1950 S C R 869.**

(234) *Art. 14—Reasonable classification —Criminal P. C. (1898), S. 30—Validity —Section not inconsistent with Art. 14.*

Section 30, Criminal P. C. does not violate the inhibition of Art. 14 of the Constitution of India. A I R 1954 Pat 218, *Affirmed.*

There is an obvious classification on which this section is based, namely, that such power may be conferred on specified Magistrates in certain localities only and in respect of some offences only, namely, all

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offences other than those punishable with death. The Legislature understands and correctly appreciates the needs of its own people which may vary from place to place. A classification may be based on geographical or territorial considerations.

The section only authorises the State Government to invest certain Magistrate with power to try all offences not punishable with death and this authority the State can exercise only in the specified places. If the State invests any Magistrate with powers under S. 30 anybody who commits any offence not punishable with death and triable by a Court of Session under S. 28 read with the second schedule is also liable to be tried by the S. 30 Magistrate. The risk of such liability falls alike upon all persons committing such an offence. Therefore, there is no discrimination in the section itself.

The contention that although the section itself may not be discriminatory, it may lend itself to abuse bringing about a discrimination between persons accused of offences of the same kind, for the police may send up a person accused of an offence under S. 366, Penal Code to a S. 30 Magistrate and the police may send another person accused of an offence under the same section to a Magistrate who can commit the accused to the Court of Session cannot be accepted as sound. The reason is that the ultimate decision as to whether a person charged under S. 366 should be tried by the Court of Session or by a S. 30 Magistrate does not depend merely on the whim or idiosyncracies of the police or the executive Government but depends ultimately on the proper exercise of judicial discretion by the Magistrate concerned.

The Constitution does not assure uniformity of decisions or immunity from merely erroneous action, whether by the Courts or the executive agencies of a State. The judicial decision must of necessity depend on the facts and circumstances of each particular case and what may superficially appear to be an unequal application of the law may not necessarily amount to a denial of equal protection of law unless there is shown to be present in it an element of intentional and purposeful discrimination. Further, the discretion of judicial officer is not arbitrary and the law provides for revision by superior Courts of orders passed

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by the Subordinate Courts. In such circumstances, there is hardly any ground for apprehending any capricious discrimination by judicial tribunals. *Budhan Chaudhry* v. *State of Bihar* **AIR 1955 S C 191.**

(235) *Art. 14 — Reasonable classification—Disqualification prescribed by S. 16 (1) (ix), Orissa Municipal Act, does not violate Art. 14—(Municipalities — Orissa Municipal Act (23 of 1950), S. 16 (1) (ix)).*

Article 14 forbids class legislation but does not forbid reasonable classification for the purposes of legislation. That classification however cannot be arbitrary but must rest upon some real and substantial distinction bearing a reasonable and just relation to the things in respect of which the classification is made. In other words the classification must have a reasonable relation to the object or the purpose sought to be achieved by the impugned legislation. The classification in S. 16 (1) (ix) has a reasonable relation to the object or purpose sought to be achieved and hence the disqualification prescribed by the section does not violate Art. 14. *Sukhawant Ali* v. *State of Orissa,* **A I R 1955 S C 166.**

(236) *Art. 14—Reasonable classification —State monopoly—Legislation creating — Whether infringes equal protection clause.*

It is well settled that mere differentiation does not make a legislation obnoxious to the equal protection clause. The Legislature has always the power to make classification and all that is necessary is that the classification should not be arbitrary but must bear a reasonable relation to the object which the legislation has in view. There is no doubt that classification is inherent in the concept of a monopoly; and if the object of legislation is to create monopoly in favour of the State with regard to a particular business, obviously the State cannot but be differentiated from ordinary citizens and placed in a separate category so far as the running of the business is concerned and this classification would have a perfectly rational relation to the object of the statute. No doubt if the creation of a monopoly in favour of the State is itself bad on the ground of violating some constitutional provisions, the statute would be invalid for those reasons and the question of discrimination would not be material at all. The argument that the State ceases to function as a State as soon

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as it engages itself in a trade like ordinary trader cannot be accepted as a sound proposition of law under the Constitution of India at the present day. *Saghir Ahmad* v. *State of U. P.*,

A I R 1954 S C 728 (740, 741)
=1954 S C J 819.

(237) *Art. 14 — Reasonable classifications—Cotton Control Order — Exemption under, in favour of certain association — Discrimination.*

'Hedging' in Cotton trading like insurance and banking, requires experience and stability also, it so vitally affects the welfare of a large section of the people of India and India's economic stability to world markets that it cannot be lightly entrusted to inexperienced hands. Where therefore the Taxtile Commissioner in his discretion exempts certain Association which had been dealing with such contracts for twenty years from the prohibition under the Cotton Control Order 1950, a recently formed association cannot complain that it is discriminated against within the meaning of Art. 14 of the Constitution. Further, when the two associations cannot be said to be on a footing of equality, no question of discrimination under Art. 14 can arise. *Madhya Bharat Cotton Association Ltd.* v. *Union of India*, **A I R 1954 S C 634 (636).**

(238) *Art. 14—Reasonable classification — Tax on purchasers of hides and skins imposed by Act 9 of 1939 — Validity — Burden of proof—(Madras General Sales Tax Act (9 of 1939), S. 1).*

It is well settled that the guarantee of equal protection of laws does not require that the same law should be made applicable to all persons. Article 14 does not forbid classification for legislative purposes, provided that such classification is based on some differentia having a reasonable relation to the object and purpose of the law in question.

Further, there is a strong presumption in favour of the validity of legislative classification and it is for those who challenge it as unconstitutional to allege and prove beyond all doubt that the legislation arbitrarily discriminates between different persons similarly circumstanced :

Held, that there was no material on record to show that the purchasers of hides and skins were similarly situated as the purchasers of other commodities or that there

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was any unreasonable discrimination against them. *V. M. Syed Mohammad & Co.* v. *State of Andhra*,

A I R 1954 S C 314 (314, 315)
=1954 S C J 390.

See also Charanjit Lal Chaudhry's case,
A I R 1951 S C 41.

(239) *Art. 14 — Reasonable classification—What is not—United State of Rajasthan Jagirdars (Abolition of Powers) Ordinance (27 of 1948), S. 8-A (inserted by Ordinance 10 of 1949 and amended by Ordinance 15 of 1949—Validity.*

A proper classification must always bear a reasonable and just relation to the things in respect of which it is proposed.

When the State of Rajasthan was formed in April and May 1949 the Jagirdars of only a part of the present State of Rajasthan could not collect their rents while Jagirdars in other areas which were covered by Jaipur, Bikaner, Jaisalmir and Jodhpur and Matsya Union were under no such disability. In the former State of Rajasthan provisions regarding the management by Government of Jagirs and the right to collect rents already existed, whereas there was no such provision in the former States of Jaipur, Bikaner, Jaisalmir and Jodhpur and Matsya Union but when the integration took place in April and May 1949 the discrimination exhibited itself not by virtue of anything inherent in the impugned Ordinances but by reason of the fact that Jagirdars of one part of the present State of Rajasthan were already subjected to a disability in the matter of management of their Jagirs while the other part were wholly unaffected. This discrimination, however undesirable, was not open to any exception until the Constitution came into force on January 26, 1950. Such an obvious discrimination could be supported only on the ground that it was based upon a reasonable classification.

In the absence of any allegation supported by evidence it could not be held that the Jagirdars of the particular area to which category the respondent belonged were differently situated to other Jagirdars. There was no real and substantial distinction why the Jagirdars of a particular area should continue to be treated with inequality as compared with the Jagirdars in another area of Rajasthan. No rational basis for any classification or differentiation had been

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made out. Section 8-A of the impugned Ordinance as amended was a clear contravention of the respondent's right under Art. 14 of the Constitution and must be declared void. *State of Rajasthan* v. *Manohar Singh*,

A I R 1954 S C 297 (298, 299)
=1954 S C R 982=1954 S C J 409.

(240) *Art. 14—Reasonable classification — Introduction of small taxis at cheaper rate is not discriminatory — (Motor Vehicles Act, S. 42).*

In construing Art. 14 the Courts should not adopt a doctrinaire approach which might well choke all beneficial legislation and that legislation which is based on a rational classification is permissible. A law applying to a class is constitutional if there is sufficient basis or reason for it. Thus, a statutory discrimination cannot be set aside as the denial of equal protection of the laws if any state of facts may reasonably be conceived to justify it. Where, therefore, in the interests and for the benefit of a section of the public small taxis have been introduced and cheaper rates have been fixed having regard to the size, horse power and expenses of running such cars, there is nothing unreasonable in this classification or any discrimination which infringes the provisions of Art. 14 of the Constitution. *Harman Singh* v. *Regional Transport Authority, Calcutta Region*,

A I R 1954 S C 190 (192)
=1954 S C R 371=1954 S C J 46.

(241) *Art. 14 — Discriminatory legislation — Validity of Waliuddowla Succession Act, 1950 — (Waliuddowla Succession Act (1950)).*

The legislation relating to succession and marriage to be valid must not offend Art. 14. The Waliuddowla Succession Act may be said to relate to these topics.

The Act discriminates specified persons from the rest of the community in that it deprives them of their right to enforce their claim, according to the personal law of their community, in a Court of law.

The object of the Act as stated in the Preamble, namely that of ending a protracted litigation, is not sufficient to make the case of these persons a class in itself and justify its differentiation from other cases o succession. The reason stated for depriving these persons of the benefit of the ordi-

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nary law, namely that their claims had been negatived by an unofficial authority, is arbitrary and unreasonable and hence the Act falls within the inhibition of Art. 14. *Ammeerunisa Begum* v. *Mehboob Begum*

A I R 1953 S C 91
=1953 S C R 404 = 1953 S C J 61

(242) *Art. 14—Reasonable classfication —What constitutes.*

There was no Income-tax Act in Nabha State prior to 20-8-1948. Hence there could be no case of assessment pending as against Nabha assessees on 20-8-1948, within the meaning of the proviso to S. 3 (1), Patiala and East Punjab States Union General Provisions (Administration) Ordinance, 2006. There can therefore be no grievance by the Nabha assessees on the score of discrimination that in respect of assessment of the income accrued in the years 2004 and 2005 while the people of Kapurthala, which is included in Pepsu, had been asked to pay income-tax at the old rate fixed by the Kapurthala Income-tax Act which was lower than the rate fixed by the Patiala Income-tax Act 2001 the people of Nabha who had not to pay any income-tax prior to 20-8-1948 at all had been made liable to pay at the higher Patiala rate. The discrimination, if any, was not brought about by the Ordinance but by the circumstance that there was no Income-tax Act in Nabha and consequently there was no case of assessment pending against any Nabha assessees. In any case, the provision that pending proceedings should be concluded according to the law applicable at the time when the rights or liabilities accrued and the proceedings commenced is a reasonable law founded upon a reasonable classification of the assessees which is permissible under the equal protection clause and to which no exception can be taken. *Ramjilal* v. *I. T. Officer*,

A I R 1951 S C 97
=1951 S C J 203=1951 S C R 127

(243) *Art. 14 — Reasonable classification — Discrimination — Presumption — Burden of proof — Discretion of Legislature — Right of Court to question.*

A law applying to one person or one class of persons is constitutional if there is sufficient basis or reason for it. Any classification which is arbitrary and which is made without any basis is no classification and a proper classification must always rest upon some difference and must bear a reasonable

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and just relation to the things in respect of which it is proposed.

The presumption is always in favour of the constitutionality of an enactment, and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles.

Per *Das J.* — If there is a classification, the Court will not hold it invalid merely because the law might have been extended to other persons who in some respects might resemble the class for which the law was made, for the Legislature is the best judge of the needs of the particular classes and to estimate the degree of evil so as to adjust its legislation according to the exigency found to exist. If, however, there is, on the face of the statute, no classification at all or none on the basis of any apparent difference specially peculiar to any particular individual or class and not applicable to any other person or class of persons and yet the law hits only the particular individual or class it is nothing but an attempt to arbitrarily single out an individual or class for discriminating and hostile legislation. The presumption in favour of the legislature cannot in such a case be legitimately stretched so as to throw the impossible onus on the complainant to prove affirmatively that there are other individuals or class of individuals who also possess the precise amount of the identical qualities which are attributed to him so as to form a class with him. *Charanjit Lal* v. *Union of India*,

A I R 1951 S C 41=1951 S C J 29
= 1950 S C R 869

(244) *Art. 15 (1) — Scope — Elections on communal lines.*

Any law providing for elections on the basis of separate electorates for members of different religious communities offends against Art. 15 (1). The constitutional mandate to the State not to discriminate against any citizen on the ground, 'inter alia', of religion clearly extends to political as well as to other rights, and any election held after the Constitution in pursuance of such a law, subject to Cl. (4) of the Article, must be held void as being repugnant to the Constitution. *Nain Sukh Das* v. *U. P. State*,

A I R 1953 S C 384
=1953 S C J 546

(245) *Art. 16—Communal G. O. reserving posts for various communities — Validity.*

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The Communal G. O. of the Madras Government which, besides making reservation of posts for Harijans & backward Hindus, as sanctioned by Cl. (4) of the Article also makes reservation of posts for other communities viz. Muslims, Christians, Non-Brahmin Hindus & Brahmins is repugnant to the provisions of Art. 16 and is as such void and illegal. *Venkataramana* v. *State of Madras*,

A I R 1951 S C 229
=1951 S C J 318

(245a) **Article 19.**

See also (1) A. I. R. 1950 S. C. 163 under Article 13.
(2) A. I. R. 1954 S. C. 300 under Criminal Procedure Code, S. 96.
(3) A. I. R. 1954 S. C. 465 under Cotton Textiles (Control of Movement) Order, 1948.
(4) A. I. R. 1954 S. C. 400 under Hindu Law.
(5) A. I. R. 1954 S. C. 282 under Hindu Law.
(6) A. I. R. 1952 S. C. 339 under Houses and Rents.
(7) A. I. R. 1954 S. C. 229 under Influx from Pakistan (Control) Act, (XXIII of 1949).
(8) A. I. R. 1950 S. C. 129 under "Public Safety".

Amendment of Constitution
Applicability
Construction
Scope
Invalid Legislation
Valid Legislation
Freedom of movements
Freedom of speech
Reasonable restriction.

(246) *Article 19 (6)—Amendment—The Constitution (First) Amendment Act, 1951 — Effect of Amendment—State monopoly in trade.*

The new clause in Article 19 (6) has no doubt been introduced with a view to provide that a State can create a monopoly in its own favour in respect of any trade or business; but the amendment does not make the establishment of such monopoly a reasonable restriction within the meaning of the first clause of Article 19 (6). The result of the amendment is that the State would not have to justify such action as

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reasonable at all in a Court of law and no objection could be taken to it on the ground that it is an infringement of the right guaranteed under Article 19 (1) (g) of the Constitution. *Saghir Ahmad and another* v. *State of U. P. and others*,

A I R 1954 S C 728 (739) =1954 S C J 819.

(247) *Article 19 (6) — Amendment of — Retrospective effect.*

The impugned Act (U. P. State Road Transport Act 2 of 1951) was passed prior to Constitution Amendment Act. The validity of the Act is not to be decided by applying the provision of the new clause.

The amendment of the Constitution, which came later, cannot be invoked to validate an earlier legislation which must be regarded as unconstitutional when it was passed. A statute void for unconstitutionality is dead and cannot be vitalised by a subsequent amendment of the Constitution removing the constitutional objection but must be re-enacted. *Saghir Ahmad and another* v. *State of U. P. and others*,

A I R 1954 S C 728 (735, 739) = 1954 S C J 819.

(248) *Art. 19 (2) — Amendment — (First Amendment) Act is not repugnant to Art. 20.*

The contention that the amendment made in Art. 19 (2) of the Constitution by the Constitution (First Amendment) Act with retrospective operation is repugnant to Art. 20 of the Constitution inasmuch as it declares a certain act an offence which was not an offence at the time when the act was committed, is untenable. Thus to the case of a person who is alleged to have violated the provisions of S. 4 (1) (a), Press (Emergency Powers) Act, which was a law in force in the year 1949 when the offending pamphlet was published and who has not been convicted of any offence and is not being again convicted for the same by reason of the amendment in Art. 19 (2), Article 20 has no application. *State of Bihar* v. *Shailabala Devi*,

A I R 1952 S C 329 = 1952 S C R 654 = 1952 S C J 465.

(249) *Arts. 19 (1) (f), 19 (5) and 31 —Applicability — Person deprived of all rights in property.*

Articles 19 (1) (f) & 31 deal with different subjects and cover different fields. There is no overlapping. Art. 19 (1) (f), read with

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Cl. (5) postulates the existence of property which can be enjoyed and over which rights can be exercised because otherwise the reasonable restrictions contemplated by Cl. (5) could not be brought into play. If there is no property which can be acquired, held or disposed of, no restriction can be placed on the exercise of the right to acquire, hold and dispose of it, and as Cl. (5) contemplates the placing of reasonable restrictions on the exercise of those rights it must follow that the Article postulates the existence of property over which these rights can be exercised. The freedoms relating to the person of a citizen guaranteed by Art. 19 assume the existence of a free citizen and can no longer be enjoyed if a citizen is deprived of his liberty by the law of preventive or punitive detention. In the same way, when there is a substantially total deprivation of property which is already held and enjoyed, one must turn to Art. 31 to see how far that is justified.

These Articles deal with substantial and substantive rights and not with illusory phantoms of the title. When every form of enjoyment which normally accompanies an intendment in this kind of property is taken away leaving the mere husk of title, Art. 19 (1) (f) is not attracted. Where the right to occupy the premises has gone as also the right to transfer, assign, let or sub-let and what is left is but the mere husk of title in the lease-hold interest Art. 19 (1) (f) read with Cl. (5) has no application. A. I. R. 1954 S. C. 92; A. I. R. 1954 S. C. 119; A. I. R. 1950 S. C. 27, *Ref. State of Bombay* v. *Bhanji Munji*,

A I R 1955 S C 41.

(250) *Art. 19 (1) (g) — Applicability— Right to use highway for carrying on trade of transporting passengers — Extent of right of public over highway — Applicability of 'franchise' in India.*

The right of the public to use motor vehicles on the public road cannot, in any sense, be regarded as a right created by the Motor Vehicles Act. The right exists anterior to any legislation on this subject as an incident of public rights over a highway. The State only controls and regulates it for the purpose of ensuring safety, peace, health and good morals of the public. Once the position is accepted that a member of the public is entitled to ply motor vehicles on the public road as an incident of his

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right of passage over highway, the question is really immaterial whether he plies a vehicle for pleasure or pastime or for the purpose of trade and business. The nature of the right in respect to the highway is not in any way affected thereby and it cannot be said that the user of a public road for purposes of trade is an extraordinary or special use of the highway which can be acquired only under special sanction from the State.

The American doctrine of franchise or in other words the rule of special or extraordinary use of highways has no place in our Constitution. Under the Indian Constitution the contract carriers as well as the common carriers would occupy the same position so far as the guaranteed right under Articles 19 (1) (g) is concerned and both are liable to be controlled by appropriate regulations under clause (6) of that Article. Within the limits imposed by State regulations any member of the public can ply motor vehicles on a public road. To that extent he can also carry on the business of transporting passengers with the aid of the vehicles. It is to this carrying on of the trade or business that the guarantee in Article 19 (1) (g) is attracted and a citizen can legitimately complain if any legislation takes away or curtails that right any more than is permissible under clause (6) of that Article.

American and English Law with regard to the right of the public to use a highway discussed and commented. *Saghir Ahmad and another* v. *State of U. P. and others*,

A I R 1954 S C 728 (735)
=1954 S C J 819.

(251) *Arts. 19 (1) (g) and 301—Applicability — U. P. State Road Transport Act (2 of 1951).*

Whether conflicts with the guarantee of freedom of inter-state and inter-state trade, commerce and intercourse provided under Art. 301?

(Quaere) Points that could be raised and the different views that are possible in this respect indicated. *Saghir Ahmad and another* v. *State of U. P. and others*,

A I R 1954 S C 728 (741, 742)
= 1954 S C J 819.

(252) *Art. 19 (1) (g) — Applicability—Discretion vested in Regional Transport Authority exercised bona fide — No violation of the Article — (Motor Vehicles Act S. 42).*

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Article 19 (1) (g) does not guarantee a monopoly to a particular individual or association to carry on any occupation and if other persons are also allowed the right to carry on the same occupation and an element of competition is introduced in the business, that does not in the absence of any bad faith on the part of the authorities, amount to a violation of the fundamental right guaranteed under Art. 19 (1) (g) of the Constitution. Under the Motor Vehicles Act it is in the discretion of the Regional Transport Authority to issue the permits at different rates of tariff to different classes of vehicles plying in the streets of a town and if that power is exercised in a *bona fide* manner by the Regional Transport Authority for the benefit of the citizens of the town, then the mere circumstance that by grant of licence at different tariff rates to holders of different taxis and different classes of vehicles some of the existing licence holders are affected cannot bring the case under Article 19 (1) (g) of the Constitution. *Harman Singh and others* v. *Regional Transport Authority, Calcutta Region and others*,

A I R 1954 S C 190 (192)
=1954 S C R 371 = 1954 S C J 46.

(253) *Art. 19—Applicability—Preventive detention, whether article applies to.*

Per *Kania C. J.*; *B. K. Mukherjea and Das JJ.* — Article 19 has no application to a legislation dealing with preventive or punitive detention as its direct object. *Gopalan* v. *State of Madras*,

A I R 1950 S C 27 = 1950
S C J 174 = 1950 S C R 88.

(254) *Article 19 — Construction—Restrictions—Meaning of.*

The normal use of the word "restriction" seems to be in the sense of 'limitation' and not 'extinction.' It does not include total prohibition. *Saghir Ahmad and another* v. *State of U. P. and others*

A I R 1954 S C 728 (737)
=1954 S C J 819.

(255) *Article 19 (1) — Construction — Connotation of "property" in Art. 19 (1) (f)—Right of Mahant to enjoy property—Nature of right—(Hindu law—Religious Endowments).*

The word "property" as used in Art. 19 (1) (f) of the Constitution, should be given a

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liberal and wide connotation and so interpreted, should be extended to those well recognised types of interest which have the insignia or characteristics of proprietary right. Thus Art. 19 (1) (f) applies equally to concrete as well as abstract rights of property. The ingredients of both office and property, of duties and personal interest are blended together in the rights of a Mahant. The Mahant has the right to enjoy this property or beneficial interest so long as he is entitled to hold his office. To take away this beneficial interest and leave him merely to the discharge of his duties will be to destroy his character as a Mahant altogether. *Commr. H. R. E.* v. *L. T. Swamiar*

A I R 1954 S C 282 (289)
=1954 S C J 335.

(256) *Arts. 19 (1) (f) and 31—Construction—Property — Meaning — Rights of share-holder to elect directors of company, give direction by passing resolution and to present petition for winding up — If property.*

Articles 19 (1) (f) and 31 only regard that as "property" which can by itself be acquired, disposed of or taken possession of. The right to vote for the election of directors the right to pass resolutions and the right to present a petition for winding up are personal rights flowing from the ownership of the share and cannot by themselves and apart from the share be acquired or disposed of or taken possession of as contemplated by those Articles. *Charanjit Lal* v. *Union of India*

A I R 1951 S C 41.

(257) *Art. 19 (2)—Construction — Absence of word 'sedition' from—Significance of.*

Deletion of the word 'sedition' from the draft Art. 13 (2), before the article was finally passed as Art. 19 (2), shows that criticism of Government exciting disaffection or bad feelings towards it is not to be regarded as a justifyng ground for restricting the freedom of expression and of the press, unless it is such as to undermine the security or tend to overthrow the State. *Romesh Thapar* v. *State of Madras*

A I R 1950 S C 124
=1950 S C J 418=1950 S C R 594.

(258) *Art. 19 (1) (d)—"Throughout the territory of India" — Free movement of Indian citizen throughout Indian Union*

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—Discrimination against — Constitution of India, Sch. 7, List 1, Entry 81.

Per *Kania C. J.*; *B. K. Mukherjea and Das JJ.* — The words "throughout the territory of India" in Art. 19 (1) (d) indicate that free movement from one State to another within the Union is protected so that Parliament may not by a law made under Entry 81 in List I of Sch. 7 curtail it beyond the limits prescribed by cl. (5) of Art. 19. Its purpose is not to provide protection for the general right of free movement but to secure a specific and special right of the Indian citizen to move freely throughout the territories of India regarded as an independent additional right apart from the general right of locomotion emanating from the freedom of the person. It is a guarantee against unfair discrimination in the matter of free movement of the Indian citizen throughout the Indian Union. In short, it is a protection against provincialism. It has nothing to do with the freedom of the person as such.

Per *Fazl Ali J.* Contra—"Throughout" is an amplifying and not a limiting expression. The expression "throughout the territory of India" is used to give the widest possible scope to the freedom of movement. These words, having regard to the context in which they have been used here, have the same force and meaning as the expression "to whatsoever place one's own inclination may direct" or the expression "freedom to be able to go whithersoever one pleases."

Juristic conception that personal liberty and freedom of movement connote the same thing is the correct and true conception, and the words used in Art. 19 (1) (d) must be construed according to this universally accepted legal conceptions Article 19 (1) (d) guarantees the right of freedom of the movement in its widest sense; the freedom of movement being the essence of personal liberty the right guaranteed under the article is really a right to personal liberty and the preventive detention is a deprivation of the right. *Gopalan* v. *State of Madras*

A I R 1950 S C 27
=1950 S C J 174=1950 S C R 88.

(259) *Art. 19—Interpretation of.*

Per *Kania C. J.* — Article 19 has to be read without any pre-conceived notions. So read, it clearly means that the legislation to be examined must be directly in respect of one of the rights mentioned in the sub-

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clauses. If there is a legislation directly attempting to control a citizen's freedom of speech or expression, or his right to assemble peaceably and without arms, etc.' the question whether that legislation is saved by the relevant saving clause of Art. 19 will arise. If however, the legislation is not directly in respect of any of these subjects, but as a result of the operation of other legislation, for instance, for punitive or preventive detention his right under any of the sub-clauses of Art. 19 is abridged, the question of the application of Art. 19 does not arise. The true approach is only to consider the directness of the legislation and not what will be the result of the detention otherwise valid, on the mode of the detenu's life. *Gopalan* v. *State of Madras*

A I R 1950 S C 27
=1950 S C J 174=1950 S C R 88.

(260) *Arts. 19, 20 to 22—Interpretation of — Article 19 gives list of individual liberties, while Arts. 20 to 22 primarily deal with penal or other laws.*

Per *B. K. Mukherjea J.*—Article 19 of the Constitution of India gives a list of individual liberties and prescribes in the various clauses the restraints that may be placed upon them by law, so that they may not conflict with public welfare or general morality. On the other hand, Arts. 20, 21 and 22 are primarily concerned with penal enactments or other laws under which personal safety or liberty of persons could be taken away in the interests of the society and they set down the limits within which State control should be exercised. Article 19 uses the expression 'freedom' and mentions the several forms and aspects of it which are secured to individuals, together with the limitations that could be placed upon them in the general interests of the society. Articles 20, 21 and 22 on the other hand do not make use of the expression "freedom" and they lay down the restrictions that are to be placed on State control where an individual is sought to be deprived of his life or personal liberty. *Gopalan* v. *State of Madras*

A I R 1950 S C 27
=1950 S C J 174=1950 S C R 88.

(261) *Arts. 19 and 31—Scope of.*

Per *Mahajan J.* — Article 31 deals with private property of persons residing in the Union of India, while Art. 19 only deals with citizens defined in Art. 5 of the Constitution. The scope of these two articles cannot be the same as they cover different fields. It cannot be seriously argued that so far as citizens are concerned, freedoms regarding enjoyment of property have been granted in two articles of the Constitution, while the protection to property qua all other persons has been dealt with in Art. 31 alone. If both articles covered the same grounds, it was unnecessary to have two articles on the same subject. The true approach to this question is that these two articles really deal with two different subjects and one has no direct relation with the other, namely, Art. 31 deals with the field of eminent domain and the whole boundary of that field is demarcated by this article. In other words, the State's power to take the property of a person is comprehensively delimited by this article. (Page 126) Per S. R. Das J. 'My view about the correlation between Art. 19 (1) (f) read with Art. 19 (5) and Art. 31 and the true meaning and the respective scope and effect of Cls. (1) and (2) of Art. 31 have been set forth in detail in my judgment in A I R 1951 S C 41 and have been more fully explained in my judgment in Appeal No. 107 of 1952 and no reiteration of them is called for (Page 133) Per *Bose J.* Article 19 (1) (f) confers a certain fundamental freedom on all citizens of India, namely the freedom to acquire, hold and dispose of property, Article 31 (1) is a sort of corollary, namely that after the property has been acquired, it cannot be taken away save by authority of law. Article 31 is wider than Art. 19 because it applies to everyone and is not restricted to citizens. But what Art. 19 (1) (f) means is that whereas a law can be passed to prevent persons who are not citizens of India from acquiring and holding property in this country no such restrictions can be placed on citizens. But in the absence of such a law non-citizens can also acquire property in India and if they do then they cannot be deprived of it any more than citizens save by authority of law. Per *Ghulam Hasan J.* Article 31 is wider than Art. 19 (1) (f) which confers upon a citizen only the right to acquire, hold and dispose of property and is different in scope and content, Article 31 is self-contained and Cl. (1) refers to deprivation of property in general.* Acquisition or taking possession in Cl. (2) are different modes of deprivation

and are comprehensive enough to include all forms of taking away rights of property (Page 139). *Dwarkadas Shrinivas* v. *The Sholapur Spinning & Weaving Co.*

AIR 1954 S C 119 (126, 133, 138, 139) =1954 S C R 674=1954 S C J 175.

(262) *Arts. 19 (1) (f) and 31 (1) — These do not provide protection against private actions.*

Neither Art. 19 (1) (f) nor Art. 31 (1) on its true construction was intended to prevent wrongful individual acts or to provide protection against merely private conduct. The language and structure of Art. 19 and its setting in Part III of the Constitution clearly show that the article was intended to protect those freedoms against State action other than in the legitimate exercise of its power to regulate private rights in the public interest. Violation of rights of property by individuals is not within the purview of the article.

The position is no better under Art. 31 (1). Even assuming that Cl. (1) of Art. 31 has to be read and construed apart from Cl. (2), it is clear that it is a declaration of the fundamental right of private property in the same negative form in which Art. 21 declares the fundamental right to life and liberty. There is no express reference to the State in Art. 21. But it cannot be suggested on that account that that article was intended to afford protection to life and personal liberty against violation by private individual. The words "except by procedure established by law" plainly exclude such a suggestion. Similarly, the words "save by authority of law" in Cl. (1) of Art. 31 show that it is a prohibition of unauthorised governmental action against private property, as there can be no question of one private individual being authorised by law to deprive another of his property.

Quære: Should Cl. (1) of Art. 31 be construed in isolation from the rest of the article. A I R (38) 1951 S C 41, *Ref. P. D. Shamdasani* v. *Central Bank of India*,

A I R 1952 S C 59.

(263) *Art. 19—Scope of—Article guarantees to citizens enjoyment of civil liberties while they are free.*

Per *Patanjali Sastri J.* — Read as a whole and viewed in its setting among the group of provisions (Arts. 19-22) relating to "Right to Freedom," Art. 19 pre-supposes that the citizen to whom the possession of

these fundamental rights is secured retains the substratum of personal freedom on which alone the enjoyment of these rights necessarily rests. But where as a penalty for committing a crime or otherwise the citizen is lawfully deprived of his freedom, there could no longer be any question of his exercising or enforcing the rights referred to in cl. (1). Deprivation of personal liberty in such a situation is not, within the purview of Art. 19 at all but is dealt with by the succeeding Arts. 20 and 21. In other words, Art. 19 guarantees to the citizens the enjoyment of certain civil liberties *while they are free*, while Arts. 20-22 secure to all persons — citizens and non-citizens — certain constitutional guarantees in regard to punishment and prevention of crime which is regarded as a special privilege or right of an Indian citizen and is protected as such. The protection of Art. 19 is coterminous with the legal capacity of a citizen to exercise the rights protected thereby, for sub-cls. (a) to (e) and (g) of Art. 19 (1) postulate the freedom of the person which alone can ensure the capacity to exercise the rights protected by those sub-clauses. A citizen who loses the freedom of his person by being lawfully detained, whether as a result of a conviction for an offence or as a result of preventive detention loses his capacity to exercise those rights and therefore, has none of the rights which sub-cls. (a) to (e) and (g) may protect. *Gopalan* v. *State of Madras*,

A I R 1950 S C 27=1950 S C J 174 =1950 S C R 88.

(264) *Art. 19—Scope of—Rights mentioned in, whether are absolute rights.*

Per *Das J.*—A perusal of Art. 19 makes it abundantly clear that none of the seven rights enumerated in cl. (1) is an absolute right, for each of these rights is liable to be curtailed by laws made or to be made by the State to the extent mentioned in the several cls. (2) to (6) of that Article. Those clauses save the power of the State to make laws imposing certain specified restrictions on the several rights. *Gopalan* v. *State of Madras*,

A I R 1950 S C 27=1950 S C J 174 =1950 S C R 88.

(265) *Arts. 19 and 21 — Scope of — Art. 19 is a separate complete article.*

Per *Kania C. J.*—It seems to me improper to read Art. 19 as dealing with the

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same subject as Art. 21. Article 19 gives the rights specified therein, only to the citizens of India while Art. 21 is applicable to all persons. The word citizen is expressly defined in the Constitution to indicate only a certain section of the inhabitants of India. Moreover, the protection given by Art. 21 is very general. It is of "law"—whatever that expression is interpreted to mean. The legislative restriction on the law-making powers of the legislature are not here prescribed in detail as in the case of the rights specified in Art. 19. Therefore, Art. 19 should be read as a separate complete Article. *Gopalan* v. *State of Madras*,

A I R 1950 S C 27
=1950 S C J 174=1950 S C R 88.

(266) *Arts. 19 and 21—Construction—"Personal liberty", connotation of.*

Per *Das J.* — The Constitution has in Art. 21 used the words "personal liberty" which have a definite connotation in law. "Personal liberty" does not mean only liberty of the person but it means liberty or the rights attached to the person *(jus personarum)*. The expression "freedom of life" or "personal liberty" are not to be found in Art. 19 and it is straining the language of Art. 19 to squeeze in personal liberty into that Article. In any case the right to life cannot be read into Art. 19. There is no reason to suppose that in Art. 21 of the Constitution the expression 'personal liberty' has been used in the restricted sense in which Blackstone used it in his Commentaries. Artice 19 protects some of the important attributes of personal liberty as independent rights and the expression 'personal liberty' has been used in Art. 21 as a compendious term including within its meaning all the varieties of rights which go to make up the personal liberties of men. *Gopalan* v. *State of Madras*,

A I R 1950 S C 27
=1950 S C J 174=1950 S C R 88.

(267) *Arts. 19, 21 and 22—Scope of—Constitution recognition by, of personal liberties.*

Per *Das J.*—The Constitution has recognised personal liberties as fundamental rights. It has guaranteed some of them under Art. 19 (1) but put restraints on them by cls. (2) to (6). It has put checks on the State's legislative powers by Arts. 21 and 22. It has by providing for preventive detention, recognised that individual liberty

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may be subordinated to the larger social interests. *Gopalan* v. *State of Madras*,

A I R 1950 S C 27
=1950 S C J 174=1950 S C R 88.

(268) *Arts. 19 and 21—Scope of—Articles are not complementary to each other.*

Per *B. K. Mukherjea J.* — Article 19 cannot be said to deal with substantive law merely, nor Art. 21 with mere matters of procedure. It cannot also be said that the provisions of Art. 19 (1) (d) read with cl. (5) and Art. 21 are complementary to each other. The contents and subject-matter of the two provisions are not identical and they proceed on totally different principles. There is no mention of any 'right to life' in Art. 19, although that is the primary and the most important thing for which provision is made in Art. 21. *Gopalan* v. *State of Madras*, **A I R 1950 S C 27**
=1950 S C J 174=1950 S C R 88.

(269) *Art. 19 (1) (g) and (6)—Invalid legislation — Cinematograph Act (1898), S. 8—Notifications by Madras State under S. 8 — In pursuance of notifications special condition 3 and condition 4 (a) imposed in licence—Validity.*

Under S. 8 of the Cinematograph Act the State of Madras issued two notifications—G. O. Mis. 1054, Home, dated 8-3-1948 and G. O. Mis. 3422, dated 15-9-1948—In pursuance of which the District Magistrate imposed certain conditions in the licence granted to the appellant who was the owner of a Cinema theatre. The appellant objected to condition 4 (a) and special condition 3 which were as follows:

'4 (a). The licensee shall exhibit at each performance one or more approved films of such length and for such length of time, as the Provincial Government or the Central Government, may, by general or special order, direct — Special condition 3 — The licensee should exhibit at the commencement of each performance not less than 2,000 feet of one or more approved films.

Held, that the impugned conditions did not amount to reasonable restrictions within the meaning of Art. 19 (6) and were therefore void and no legal effect as against the fundamental right of the appellant under Art. 19 (1) (g). *R. M. Seshadri* v. *District Magistrate, Tajore and another*,

A I R 1954 S C 747 (748, 749)
=1954 S C J 842.

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(270) *Art. 19 (1) (g) — Invalid legislation—U. P. District Boards Act, S. 174—Bye-law under sub-s. (2) (1) prohibiting holding of market.*

Sub-sections (1) and (2) (1) of S. 174, U. P. District Boards Act, 1922, show that the power of the Board to make bye-laws is to be exercised for the purpose of promoting or maintaining the health, safety and convenience of the inhabitants of the area within its jurisdiction and that this power includes the power to regulate markets as mentioned in sub-s. 2 (1).

Where therefore certain District Board frames a bye-law to the effect that no person shall establish or maintain or run any cattle market in the District within its jurisdiction, the bye-law is not one passed for regulating the market but for prohibiting a person from holding it. Such a bye-law in face of the provisions of S. 174 is obviously beyond jurisdiction. The bye-law as well as the order under it interferes with the fundamental right of the petitioner under Art. 19 (1) (g) as it prevents him from carrying on the business of holding the market. It is thus in conflict with Art. 19 (1) (g) and is void. *Tahir Hussain* v. *District Board, Muzafarnagar,*

A I R 1954 S C 630 (631, 632).

(271) *Article 19 (1) (g), 31 (2)—Invalid legislation— Rajasthan Fooding Control Order (1919), Cl. 25—Validity.*

The freezing of the stocks of foodgrains under Cl. 25 of the Rajasthan Foodgrains Control Order 1949, is reasonably related to the object, which the essential supplies (Temporary Powers) Act, 1946, was intended to achieve namely to secure the equitable distribution and availability at fair price and to regulate transport, distribution, disposal and acquisition of an essential commodity such as foodgrains. The first portion of the clause cannot therefore be held as void under Art. 19 (1) (g).

The last portion of the clause, however, places an unreasonable restriction upon the carrying on of trade or business and is thus an infringement of the dealers right under Art. 19 (1) (g) of the Constitution and is therefore to that extent void.

The same result follows if the impugned clause is examined in the light of Art. 31 (2). The clause by vesting the power in the authority. The same result follows if the impugned clause is examined in the light of Art. 31 (2). The clause by vesting the power in the authority to acquire the stocks at any price fails to fix the amount of the compensation or specify the principles on which the compensation is to be determined. The clause leaves it entirely to the discretion of the executive authority to fix the compensation it likes and thus offends against Art. 31 (2) *State of Rajasthan* v. *Nath Mal,*

A I R 1954 S C 307 (308)

(272) *Art. 19 (6) — Invalid legislation —U. P. Control Order (1953), Clause 3 (2) (b)—Validity.*

An unrestricted power has been given to the State Controller to make exemptions and even if he acts arbitrarily or from improper motives, there is no check over it and no way of obtaining redress, Clause 3 (2) (b) of the Control Order is therefore *prima facie* uureasonable. However this portion of the Control Order, even though bad, is severable from the rest. *Messrs. Dwarka Prasad Laxmi Narain* v. *State of Uttar Pradesh,*

A I R 1954 S C 224 =1954 S C R 803=1954 S C J 238.

(273) *Arts. 19 (1) (c) & (4)—Invalid legislation— Criminal Law Amendment Act (1908), Sec. 15 (2) (b) (as amended in Madras by Madras Act XI (11) of 1950)— Validity.*

Section 15 (2) (b) as amended in Madras by the Criminal Law Amendment (Madras) Act 1950, falls outside the scope of authorised restrictions under Cl. (4) of Art. 19 and is, therefore, unconstitutional and void. The right to form associations or unions has such wide and varied scope for its exercise, and its curtailment is fraught with such potential reactions in the religious, political and economic fields, that the vesting of authority in the executive Government to impose restrictions on such right without allowing the grounds of such imposition, both in their factual and legal aspects, to be duly tested in a judicial inquiry, is a strong element which must be taken into account in judging the reasonableness of the restrictions imposed by Section 15 (2) (b) on the exercise of the fundamental right under Article 19 (1) (c); for, no summary and what is bound to be a largely one-sided review by an Advisory Board, even where its verdict is binding on the executive Government, can be a substi-

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tute for a judicial enquiry. The formula of subjective satisfaction of the Govt. or of its officers, with an Advisory Board thrown in to review the materials on which the Government seeks to override a basic freedom guaranteed to the citizen, may be viewed as reasonable only in very exceptional circumstances and within the narrowest limits, and cannot receive judicial approval as a general pattern of reasonable restrictions on fundamental rights. AIR 1951 Mad. 147, Affirmed: AIR 1950 S C 27 and AIR 1950 S C 211, Disting. *The State of Madras* v. *V. G. Row.*

A I R 1952 S C 196 =1952 S C R 597=1952 S C J 253.

(274) *Art. 19 (1) (g)—Invalid legislation—Town area Committee, Jalalabad—Bye-laws 1 & 4 (b)—Validity.*

The bye-laws do not, in terms, prohibit anybody from dealing in vegetables and fruits. But although, in form, there is no prohibition against carrying on any wholesale business by anybody, in effect and in substance the bye-laws have brought about a total stoppage of the wholesale dealers' business in a commercial sense: A. I. R. 1950 S. C. 163, *Disting. Mohammed Yasin* v. *Town Area Committee Jalalabad,*

A I R 1952 S C 115 =1952 S C R 572=1952 S C J 162.

(275) *Art. 19 (1) (g)—Invalid legislation—Municipalities—U. P. Municipalities Act (II (2) of 1916), Ss. 293 (1) & 298 (2) (j) (d)—Scope—Town Area Committee, Jalalabad—Bye-laws 1 & 4—Validity*

Sections 293 (1) and 298 (2) (j) (d) of the U. P. Municipalities Act 1916, as amended at the time they were extended to the town areas in the United Provinces do not empower the town Area Committee to make any bye law authorising it to charge any fees otherwise than for the use or occupation of any property vested in or entrusted to the management of the Town Area Committee including any public street. Bye-laws 1 and 4 go much beyond the powers conferred on the Committee by the sections mentioned above. If anybody uses the public street it is the growers of vegetables and fruits who come to the wholesale dealer's shop to get their produce auctioned by him and he cannot be charged with fees for use of the public street by those persons. The bye-laws which impose a charge on the

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wholesale dealer in the shape of the prescribed fee, irrespective of any use or occupation by him of immovable property vested in or entrusted to the management of the Town Area Committee including any public street, are obviously *ultra vires* the powers of the Committee and, therefore, the bye-laws cannot be said to constitute a valid law which alone may, under Article 19 (6) of the Constitution, impose a restriction on the right conferred by Art. 19 (1) (g). In the absence of any valid law authorising it, such illegal imposition must undoubtedly operate as an illegal restraint and must infringe the unfettered right of the wholesale dealer to carry on his occupation, trade or business which is guaranteed to him by Art. 19 (1) (g). *Mohammed Yasin* v. *Town Area Committee, Jalalabad.*

A I R 1952 S C 115 =1952 S C R 572=1952 S C J 162.

(276) *Arts. 19 (1) (g), 19 (5) — Valid legislation — Essential Supplies (Temporary Powers) Act, S. 2 (a) — Cotton Control Order (1950), Cl. 4 — Validity — Article 19 (1) (g) not contravened.*

Cotton was listed as an "essential commodity" under S. 2 (a) of the Essential Supplies (Temporary Powers) Act, 1946, so the right of the State to control, and even to prohibit transactions like 'Hedging' in the cotton trading is evident.

Further, cotton being a commodity essential to the life of the community, it is reasonable to have restrictions which may, in certain circumstances, extend to total prohibition for a time, of all normal trading in the commodity. Accordingly, Cl. 4 of the Cotton Control Order of 1950 does not offend Art. 19 (1) (g) of the Constitution because sub-cl. (5) validates it. *Madhya Bharat Cotton Association Ltd.* v. *Union of India,*

A I R 1954 S C 634 (635)

(277) *Art. 19 (1) (g)—Valid legislation—Bar Councils Act (1926), S. 9 (1), Proviso — Validity — Contravention of Art. 19 (1) (g) — Constitution of India, Art. 19 (1) (g)—Bar Council Rules—Validity.*

The proviso to sub-s. (1) of S. 9 of the Indian Bar Councils Act is not void, as being an unreasonable restriction upon the freedom to practise a profession, or to carry on an occupation, trade or calling which is guaranteed under Art. 19 (1) (g) of the Constitution.

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Rule 10 does not say that the High Court is to exercise its discretion without giving any notice to the person, whose application is going to be refused. As a matter of fact, it is to be normally expected that the High Court would give notice to the person, whose application for enrolment is before it for consideration, and give him an opportunity to explain anything that might appear against him before it rejects his application. The rule is not, therefore, per se unreasonable and void.

Held, that the facts of the case did not show that the High Court exercised its discretion in violation of the canons of natural justice. *Babul Chandra* v. *Chief Justice & Judges*, **A I R 1954 S C 524**

(278) *Art. 19 (1) (g) and (6) — Valid legislation — Business relating to intoxicating liquors — Competency of state to regulate it — Provisions of Excise Regulation are valid (Ajmer) (I of 1915).*

The Legislature of a State is fully competent to regulate the business of vending intoxicating Liquor, to mitigate its evils or to suppress it entirely. There is no inherent right in a citizen to sell intoxicating liquors by retail, it is not a privilege of a citizen. As it is a business attended with danger to the community, it may be entirely prohibited, or be permitted under such conditions as will limit to the utmost its evils. The manner and extent of regulation rest in the discretion of the governing authority. That authority may vest in such officers as it may deem proper the power of passing upon applications for permission to carry it on, and to issue licences for that purpose, it is a matter of legislative will only. Hence the provisions of the (Ajmer) Excise Regulation (1 of 1915) purporting to regulate trade in liquor in all its different spheres are valid. *Cooverjee B. Bharucha* v. *Excise Commissioner and the Chief Commissioner, Ajmer*, **A I R 1954 S C 220 (223)= 1954 S C R 873=1954 S C J 246**

(279) *Arts. 19, 31—Valid legislation — Bengal Land Revenue Sales (West Bengal Amendment) Act (7 of 1950), S. 7 — Validity.*

Article 19 (1) (f) declares the citizen's right to own property and has no reference to the right to the property owned by him, which is dealt with in Art. 31. The framers of our Constitution classed the natural right

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or capacity of a citizen "to acquire, hold and dispose of property" with other natural rights and freedoms inherent in the status of a free citizen and embodied them in Art. 19 (1) while they provided for the protection of concrete rights of property owned by a person in Art. 31. Under the scheme of the Constitution, all those broad and basic freedoms inherent in the status of a citizen as a free man are embodied and protected from invasion by the State under Cl. (1) of Art. 19. The powers of State regulation of those freedoms in public interest being defined in relation to each of those freedoms by Cls. (2) to (6) of that article, while rights of private property are separately dealt with and their protection provided for in Art. 31. The cases where social control and regulation could extend to the deprivation of such rights being indicated in para (ii) of sub-cl. (b) of Cl. (5) of Art. 31 and exempted from liability to pay compensation under Cl. (2).

Sub-clause (f) of Cl. (1) of Art. 19 has no application to the question of validity of S. 7 of the Amending Act (7 of 1950). The question whether S. 7 of the Amending Act is a reasonable restriction on the exercise of the purchasers right to the property purchased by him cannot also arise. *State of West Bengal* v. *Subodh Gopal Bose*, **A I R 1954 S C 92 (95, 96, 106, 117)= 1954 S C R 587=1954 S C J 727**

(280) *Arts. 19 (1) (a) (c), 14 — Valid legislation—Industrial Disputes (Appellate Tribunal) Act (1950), S. 27—Validity.*

The labour Disputes (Appellate Tribunal) Act 1950 imposes no restriction either upon the freedom of speech and expression of the Textile workers or their right to form associations or Unions. Similarly, it makes no discrimination between Textile workers as a class but lays down a reasonable classification to the effect a certain percentage of membership possessed by a Union will be allowed to represent the workers as a class to the exclusion of others, but there is nothing to prevent the other Unions or other workers from forming a fresh Union and enrolling a higher percentage so as to acquire the sole right of representation. Hence S. 27 of the Industrial Disputes (Appellate Tribunal) Act is not void as being opposed to the fundamental rights under Art. 19 (1) (a) and (c)

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and Art. 14 of the Constitution. *Raja Kulkarni* v. *The State of Bombay*,

A I R 1954 S C 73 (75)
=1954 S C R 384=1954 S C J 50

(281) *Arts 19, 21 and 22—Valid legistion—Detention of persons for preventing them from making speeches prejudicial to maintenance of public order — Legality—Public Safety — Preventive Detention Act (1950), S. 3.*

Although personal liberty has a content sufficiently comprehensive to include the freedoms enumerated in Art. 19 (1) and its deprivation would result in the extinction of those freedoms, the Constitution has treated these civil liberties as distinct fundamental rights and made separate provisions in Art. 19 and Arts. 21 and 22 as to the limitations and conditions subject to which alone they could be taken away or abridged. A law which authorises deprivation of personal liberty does not fall within the purview of Art. 19 and its validity is not to be judged by the criteria indicated in that Article but depends on its compliance with the requirements of Arts. 21 and 22.

Articles 19 clearly means that the legislation to be examined must be directly in respect of one of the rights mentioned in the sub-clauses. If there is a legislation directly attempting to control a citizen's freedom of speech or expression, or his right to assemble peaceably and without arms, etc., the question whether that legislation is saved by the relevant saving clause of Art. 19 will arise. If, however, the legislation is not directly in respect of any of these subjects, but as a result of the operation of other legislation, for instance, for punitive or preventive detention, his right under any of these sub-clauses is abridged, the question of the application of Art. 19 does not arise. The true approach is only to consider the directness of the legislation and not what will be the result of the detention otherwise valid on the mode of the detenu's life.

It therefore clearly follows that the order of detention under S. 3 of the Preventive Detention Act, 1950, preventing certain person from making speeches prejudicial to the maintenance of the public order is valid even though it has the result of abridging his right under Art. 19 (1) (a) by such

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detention. A I R (37) 1950 S C 27, *Foll.*; AIR (37) 1950 S C 124 and AIR (37) 1950 S C 129, *Ref. Ram Singh* v. *State of Delhi*, AIR 1951 S C 270
=1951 S C R 451=1951 S C J 371.

(282) *Art. 19 (5)—Valid legislation — East Punjab Public Safety Act (V [5] of 1949), S. 4 (3) — Order of externment for three months — Period whether unreasonable — Possibility of abuse of power — Whether ground for impugning an Act.*

(Majority View ; *Mukherjee and Mahajan JJ., dissenting)* — The period of three months for which an order of externment may be passed by a District Magistrate under S. 4 (3), East Punjab Public Safety Act, 1949, is not prima facie unreasonable, even though the externee has no remedy during that time. The further extension of the externments order beyond three months may be for an indefinite period, but in that connection the fact that the whole Act is to remain in force only up to 14th August 1951 cannot be overlooked. Moreover, this whole argument is based on the assumption that the Provincial Government when making the order will not perform its duty and may absue the provisions of the section. It is improper to start with such an assumption and decide the legality of an Act on that basis. Abuse of the power given by a law sometimes occurs ; but the validity of the law cannot be contested because of such an apprehension.

Per *Mukherjee J.* — There is absolutely no limit under S. 4 (3) as to the period of time during which an externment order would remain in force if the order is made by the Provincial Government. The Provincial Government has been given unlimited authority in this respect and they can keep the order in force as long as they choose to do so. As regards orders made by a District Magistrate, the period indeed has been fixed at 3 months but even here the Provincial Government is competent to extend it to any length of time by means of a special order. The law does not fix any maximum period beyond which the order cannot continue ; and the fact that the Act itself would expire in August, 1951 is not a relevant matter for consideration in this connection at all. The provision of subs. (3) of S. 4, is therefore manifestly un-

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reasonable and cannot be supported on any just ground. *N. B. Khare* v. *State of Delhi*, **AIR 1950 S C 211=1950 S C J 328 =1950 S C R 519.**

(283) *Art. 19 (5)— Valid legislation — East Punjab Public Safety Act (V [5] of 1949), S. 4 (1) (c)—Power to order externment of given to District Magistrate—Delegation whether amounts to unreasonable restrictions within Art. 19 (5).*

Per *Kania C. J.*, expressing the views of the Majority — The contention that S. 4, East Punjab Act, 1949, which gives the power to make an order of externment to the District Magistrate whose satisfaction is final and not open to review by the Courts, contained an unreasonable restriction on the exercise of the citizens' right within the meaning of Art. 19 (5) of the Constitution and is therefore invalid, is not sound, as it is not legislative delegation. The desirability of passing an individual order of externment against a citizen has to be left to an officer. In the Act such a provision cannot be made. The satisfaction of the officer thus does not impose an unreasonable restriction on the exercise of the citizens' right.

Per *B. K. Mukherjea J.* — Under Clause (5) of Art. 19 the reasonableness of a challenged legislation has to be determined by a Court and the Court decides such matters by applying some objective standard which is said to be the standard of an average prudent man. Judged by such standard which is sometimes described as an external yard stick, the vesting of authority in particular officers to take prompt action under emergent circumstances entirely on their own responsibility or personal satisfaction, is not necessarily unreasonable. One has to take into account the whole scheme of the legislation and the circumstances under which the restrictive orders could be made. Preventive orders by their very nature cannot be made after any judicial enquiry or trial. The provision of S. 4 (1) (c), East Punjab Public Safety Act, cannot therefore be pronounced to be unreasonable, simply because the order could be passed by the Provincial Government or the District Magistrate on their own personal satisfaction and not on materials which satisfy certain objective tests. *N. B. Khare* v. *State of Delhi*, **AIR 1950 S C 211 =1950 S C J 328=1950 S C R 519.**

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(284) *Art. 19 (1) (d) — Freedom of movements — Partial restriction—Art. 19 (5) and Art. 21—Deprivation of personal liberty not the same thing as restriction on the movement.*

Deprivation (total loss) of personal liberty which is sought to be protected by the expression "personal liberty" in Art. 21 is quite different from restriction (which is only a partial control) of the right to move freely (which is relatively a minor right of a citizen) as safeguarded by Art. 19 (1) (d). Deprivation of the personal liberty has not the same meaning as restriction of free movement in the territory of India. Therefore, Art. 19 (5) cannot apply to a substantive law depriving a citizen of personal liberty. The contention, that the word 'deprivation' includes within its scope 'restriction' when interpreting Art. 21 is not acceptable.

Per *Fazl Ali J., Contra.*— Preventive detention amounts to a complete deprivation of the right guaranteed by Art. 19 (1) (d). It is highly technical to argue that deprivation of a right cannot be said to involve restriction on the exercise of the right. Having regard to the context in which the word 'restriction' has been used, there is no antithesis between that word and the word 'deprivation'. Restraint on the right to move can assume a variety of forms and restriction would be the most appropriate expression to be used in Cl. (5) of Art. 19 so as to cover all those forms ranging from total to various kinds of partial deprivation of freedom of movement. *Gopalan* v. *State of Madras*, **A I R 1950 S C 27= 1950 S C J 174=1950 S C R 88.**

(285) *Art. 19 (1) (d) and (5) — Right of free movement — Extent of — Right whether means absence of inter-State — restrictions—Act restricting the right — Validity — Public Safety—East Punjab Public Safety Act (V [5] of 1949), S. 4 (1) (c).*

Per *Mukherjea J.*—The contention that the right of free movement throughout the Indian territory as enunciated in Art. 19 (1) (d) of Constitution contemplates nothing else but absence of inter-State restrictions, which might prevent citizens of the Indian Union from moving from one State to another and that a law which does not impose barriers of this kind cannot be said to be inconsistent with the fundamental right

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secured by this clause is not tenable, as such a restricted interpretation is not at all warranted by the language of the sub-clause. What Art. 19 (1) (d) of the Constitution guarantees is the free right of all citizens to go wherever they like in the Indian territory without any kind of restriction whatsoever. They can move not merely from one State to another but from one place to another within the same State and what the Constitution lays stress upon is that the entire Indian territory is one unit so far as the citizens are concerned. Clause (c) of S. 4 (1), East Punjab Public Safety Act, 1949, authorises the Provincial Government or the District Magistrate to direct any person to remove himself from any area and prohibit him from entering the same. On the face of it such provision represents an interference with fundamental right guaranteed by Art. 19 (1) (d) of the Constitution. *N. B. Khare* v. *State of Delhi*,

A I R 1950 S C 211=1950 S C J 328 =1950 S C R 519.

(286) *Art. 19 (1) (a) — Freedom of speech — Curtailment of rights, when justified.*

The Constitution, in formulating the varying criteria for permissible legislation imposing restrictions on the fundamental rights enumerated in Art. 19 (1), has placed in a distinct category those offences against public order which aim at undermining the security of the State or overthrowing it, and made their prevention the sole justification for legislative abridgment of freedom of speech and expression. Thus, nothing less than endangering the foundations of the State or threatening its overthrow could justify curtailment of the rights to freedom of speech and expression, while the right of peaceable assembly (sub-cl. (b)) and the right of association (sub-cl. (c)) may be restricted under cls. (3) and (4) of Art. 19 in the interest of "public order", which in those clauses includes the security of the State. *Romesh Thapar* v. *State of Madras*,

A I R 1950 S C 124 =1950 S C J 418 = 1950 S C R 594.

(287) *Art. 19 (2)—Freedom of speech —Restriction on speech and expression — Invalidity of — Madras Maintenance of Public Order Act, 1949 (XXIII [23] of 1949), S. 9 (1-A).*

Unless a law restricting freedom of speech and expression is directed solely against the undermining of the security of the State or the overthrow of it, such law cannot fall within the reservation under cl. (2) of Art. 19, although the restrictions which it seeks to impose may have been conceived generally in the interests of public order. Clause (2) of Art. 19 having allowed the imposition of restrictions on the freedom of speech and expression only in cases where danger to public security is involved, an enactment, which is capable of being applied to cases where no such danger could arise, cannot be held to be constitutional and valid to any extent. It follows that S. 9 (1-A), Madras Maintenance of Public Order Act, 1949, which authorises imposition of restrictions for the wider purpose of securing public safety or the maintenance of public order falls outside the scope of authorised restrictions under cl. (2), and is therefore void and unconstitutional. *Romesh Thapar* v. *State of Madras*,

A I R 1950 S C 124=1950 S C J 418 =1950 S C R 594.

(288) *Art. 19 (1) (a) — Freedom of speech and expression.*

Freedom of speech and expression includes freedom of propagation of ideas, and that freedom is ensured by the freedom of circulation. *Romesh Thapar* v. *State of Madras*, **A I R 1950 S C 124 =1950 S C J 418=1950 S C R 594.**

(289) *Arts. 19 (1) (f), 19 (1) (g) — Reasonable restriction —Right to hold fair on one's land — Nature of—(Ajmer Laws Regulation (3 of 1877), S. 40 — Rules under, R. 1).*

A right to hold fair on one's own land is a fundamental right under Art. 19 (1) (f) which can only be restricted in the manner permitted by sub-Cl. (5). The holding of an annual fair is also an occupation or business within the meaning of Art. 19 (1) (g); therefore, the person also has a fundamental right to engage in that occupation on his land provided it does not infringe any law imposing "reasonable restrictions on that right in the interests of the general public." *Ganpat Singh* v. *State of Ajmer*,

A I R 1955 SC 188.

(290) *Art. 19 (1) (g) and (5)—Reasonable restriction — S. 16 (1) (ix), Orissa Municipal Act, does not violate Art. 19 (1) (g)— Municipalities — Orissa Municipal Act (23 of 1950), S. 16 (1) (ix)).*

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The right of a person to practice the profession of law guaranteed by Art. 19 (1) (g) cannot be said to have been violated by S. 16 (1) (ix) because in laying down the disqualification in S. 16 (1) (ix) of the Act the Legislature does not prevent him from practising his profession of law but it only lays down that if he wants to stand as a candidate for election he shall not either be employed as a paid legal practitioner on behalf of the Municipality or act as a legal practitioner against the Municipality. There is no fundamental right in any person to stand as a candidate for election to the Municipality. The only fundamental right which is guaranteed is that of practising any profession or carrying on any occupation, trade or business. There is no violation of the latter right in prescribing the disqualification of the type enacted in S. 16 (1) (ix) of the Act. Even if it be taken as a restriction on his right to practise his profession of law, such restriction would be a reasonable one and well within the ambit of Art. 19, Clause 5. *Sukhawant Ali* v. *State of Orissa*, **A I R 1955 SC 166.**

(291) *Art. 19 (1) (g) and (6)—Reasonable restrictions — Reasonableness — Test — Monopoly by State.*

The question whether the restrictions imposed by a particular legislation on the exercise of the fundamental right under Art. 19 (1) (g) are reasonable or not would depend on the nature of the trade and the conditions prevalent.

In order to judge whether State monopoly is reasonable or not, regard therefore must be had to the facts of each particular case in its own setting of time and circumstances. It is not enough to say that as an efficient transport service is conducive to the interests of the people, a legislation which makes provision for such service must always be held irrespective of the fact as to what the effect of such legislation would be and irrespective of the particular conditions and circumstances under which the legislation was passed. It is not enough that the restrictions are for the benefit of the public, they must be reasonable as well and the reasonableness could be decided only on a conspectus of all the relevant facts and circumstances. *Saghir Ahmad* v. *State of U. P.* **A I R 1954 S C 728 (738) =1954 S C J 819.**

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(292) *Art. 19 (1) — Reasonable restriction—Test—Mahant of Math— His rights and duties — Restrictions on Mahant — (Hindu Law—Religious Endowment).*

The beneficial interest which a Mahant enjoys is appurtenant to his duties and as he is in charge of a public institution, reasonable restrictions can always be placed upon his rights in the interest of the public. But the restrictions would cease to be reasonable if they are calculated to make him unfit to discharge the duties which he is called upon to discharge. A Mahant's duty is not simply to manage the temporalities of a Math. He is the head and superior of spiritual fraternity and the purpose of Math is to encourage and foster spiritual training by maintenance of a competent line of teachers who could impart religious training by maintenance of a competent line of teachers who could impart religious instructions to the disciples and followers of the Math and try to strengthen the doctrines of the particular school of order, of which they profess to be adherents. This purpose cannot be served if the restrictions are such as would bring the Mathadhipati down to the level of a servant under a State department. It is from this standpoint that the reasonableness of the restrictions should be judged. *Commr. H. R. E.* v. *L. T. Swamiar*, **A I R 1954 S C 282 (289) =1954 S C J 335.**

(293) *Art. 19 (1) (g) and (6)—Reasonable restriction — Phrase explained.*

The phrase 'reasonable restriction' connotes that the limitation imposed upon a person in enjoyment of a right should not be arbitrary or of an excessive nature beyond what is required in the interest of the public. Legislation which arbitrarily or excessively invades the right, cannot be said to contain the quality of reasonableness and unless it strikes a proper balance between the freedom guaranteed under Article 19 (1) (g) and the social control permitted by Clause (6) of Article 19, it must be held to be wanting in reasonableness. A law or order, therefore, which confers arbitrary and uncontrolled power upon the executive in the matter of regulating trade or business in normally available commodities cannot but be held to be unreasonable. *Messrs. Dwarka Prasad Laxmi Narain* v. *State of Uttar Pradesh*, **A I R 1954 S C 224 =1954 S C R 803=1954 S C J 238.**

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(294) *Art. 19 (1) (g) and (6)—Reasonable restriction—What is not—U. P. Coal Control Order 1953, Cl. 4 (3)—Validity.*

The provision of Cl. 4 (3) must be held to be void as imposing and unreasonable restriction upon the freedom of trade and business guaranteed under Art. 19 (1) (g) of the Constitution and not coming within the protection afforded by Cl. (6) of the Article. *Messrs. Dwarka Prasad Laxmi Narain* v. *State of Utter Pradesh,*

A I R 1954 S C 224 =1954 S C R 803=1954 S C J 238.

(295) *Art. 19 (1) (g) and (6)—Reasonable restriction—U. P. Coal Control Order (1953), cls. 7 and 8 — Reasonable restrictions.*

Clauses 7 and 8 of the Control Order do not impose unreasonable restrictions upon the freedom of trade. *Messrs. Dwarka Prasad Laxmi Narain* v. *State of Utter Pradesh.* **A I R 1954 S C 224 =1954 S C R 803=1954 S C J 238.**

(296) *Art. 19 (6) — Reasonable restriction — Business relating to intoxicating liquors—Conferment of Monopoly rights.*

The contention that the effect of some of the provisions of Excise Regulation (1 of 1915) is to enable Government to confer monopoly rights on one or more persons to the exclusion of others and that creation of such monopoly rights could not be sustained under Art. 19 (6), Constitution of India, is without force. Elimination and exclusion from business is inherent in the nature of liquor business and it will hardly be proper to apply to such a business principles applicable to trades which all can carry. The provisions of the Excise Regulation (1 of 1915) cannot be attacked merely on the ground that they create a monopoly. There can be a monopoly only when a trade which can be carried on by all persons is entrusted by law to one or more persons to the exclusion of the general public. But when a contract is thrown open to public auction, it cannot be said that there is exclusion of competition and thereby a monopoly is created. Further in certain circumstances exclusion of competition so as to create a monopoly either in a State or in some other body may be justified. Every case must be judged on its own facts and in its own setting of time. For these reasons the contention that the provisions of the Excise Regulation (1 of 1915) are unconstitutional

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as they abridge the rights of the petitioner to carry on liquor trade freely cannot be sustained. *Cooverjee P. Bharucha* v. *Excise Commissioner and the Chief Commissioner, Ajmer,*

A I R 1954 S C 220 (223, 224) =1954 S C R 873=1954 S C J 246.

(297) *Art. 19 (6) — Reasonable restriction—Reasonableness how determined.*

In order to determine the reasonableness of the restriction regard must be had to the nature of the business and the conditions prevailing in the trade. It is obvious that these factors must differ from trade to trade and no hard and fast rules concerning all trades can be laid down. The right of every citizen to pursue any lawful trade or business is obviously subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, order and morals of the community. *Cooverjee B. Bharucha* v. *Excise Commissioner and the Chief Commissioner, Ajmer,*

A I R 1954 S C 220 (223) =1954 S C R 873=1954 S C J 246.

(298) *Arts. 19 (6) and 47—Reasonable restriction—Basis of restriction on Trade of intoxicating liquors.*

That when the liquors are taken in excess the injuries are confined to the party offending is a fact which does not exist. The injury, it is true, first falls upon him in his health, which the habit undermines in his morals which it weakens and in the self-abasement which it creates. But as it leads to neglect of business and waste of property and general demoralisation, it affects those who are immediately connected with and dependent upon him. By the general concurrence of opinion of every civilized community, there are few sources of crime and misery to society equal to the dram shop, where intoxicating liquors, in small quantities, to be drunk at the time, are sold indiscriminately to all parties applying. The sale of such liquors in this way has therefore been at all times, by the Courts of every State, considered as the proper subject of legislative regulation. *Cooverjee B. Bharucha* v. *Excise Commissioner and the Chief Commissioner, Ajmer,*

A I R 1954 S C 220 (223) =1954 S C R 873=1954 S C J 246.

(299) *Art. 19 (5) — Reasonable restriction — What is not — Considerations —*

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Bengal Land Revenue Sales (West Bengal Amendment) Act (7 of 1950), S. 7).

Though the fact that a statute is expressly or by necessary implication made retrospective, does not by itself, furnish any cogent reason for saying that the statute is *prima facie* unfair and, therefore, unreasonable the fact of the statute being given retrospective effect may be properly taken into consideration in determining the reasonableness of the general public. The loss occasioned to the purchaser by reducing, without any abatement of the purchase price, an estate in possession into one in reversion may also be taken into account in determining the reasonableness of the restrictions permissible under Art. 19 (5). The conditions prevailing at the time which actuated the sponsor of the Bill to introduce the same and the extent and urgency of the evil which he sought to remedy are all matters which must enter into the judicial verdict as to the reasonableness of the restrictions which Art. 19 (5) permits to be imposed on the exercise of the right guaranteed by Art. 19 (1) (f). *Held*, that in the circumstances the infliction of the loss of the right of the purchaser to eject under-tenants under S. 7 of the Amending Act (7 of 1950) could only be regarded as a reasonable restriction permitted by Art. 19 (5) to be imposed on the exercise of the right guaranteed under Art. 19 (1) (f). *State of West Bengal* v. *Subodh Gopal Bose*,

A I R 1954 S C 92 (117, 118) =1954 S C R 587=1954 S C J 127.

(300) *Art. 19 (5) — Reasonable restriction.*

When a law deprives a person of possession of his property for an indefinite period of time merely on the subjective determination of an executive officer, such a law can on no construction of the word "reasonable" be described as coming within that expression, because it completely negatives the fundamental right by making its enjoyment depend on the mere pleasure and discretion of the executive, the citizen affected having no right to have recourse for establishing the contrary in a civil Court. *Raghubir Singh* v. *Court of Wards, Ajmer*,

A I R 1953 S C 373 =1954 S C R 1049=1953 S C J 505.

(301) *Art. 19 (1) (g) and (6)—Reasonable restrictions — Restriction placed upon use of bus-stand — (Motor Vehicles Act (1939), S. 68 (2) (r)—Rules under—Madras Vehicles Rules (1940), R. 268).*

There is no fundamental right in a citizen to carry on business wherever he chooses and his right must be subject to any reasonable restriction imposed by the executive authority in the interest of public convenience.

For the convenience of the travelling public, the Transport Authority resolved to alter the starting places and termini of all public service vehicles (other than motor cabs) arriving at and proceeding from Tanjore from the existing bus-stand owned by the appellant to the Municipal bus-stand in another area of the town. What was prohibited was that the bus-stand owned by the appellant being unsuitable from the point of view of public convenience it could not be used for picking up or setting down passengers from that stand for out-stations journeys. But there was no prohibition for the bus-stand being used otherwise for carrying passengers from the stand into the town, and vice versa :

Held, that the order of the Transport Authority was not repugnant to Art. 19 (1) (g). *T. B. Ibrahim* v. *Regional Transport Authority, Tanjore*,

A I R 1953 S C 79 =1953 S C R 290=1953 S C J 31.

(302) *Art. 19 (5) — Reasonableness of restrictions upon right of free movement.*

The determination of the question as to whether the restrictions imposed by a legislative enactment upon the fundamental rights of a citizen enunciated in Art. 19 (1) (d) of the Constitution are reasonable or not within the meaning of cl. 5 of the Article would depend as much upon the procedural part of the law as upon the substantive part, and the Court has got to look in each case to the circumstances under which and the manner in which the restrictions have been imposed. *Gurbachan Singh* v. *State of Bombay*,

A I R 1952 S C 221 =1952 S C R 737=1952 S C J 321.

(303) *Art. 19 — Reasonableness of restrictions—Test.*

The test of reasonableness, wherever prescribed, should be applied to each individual statute impugned, and no abstract standard, or general pattern, of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have

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been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict. In evaluating such elusive factors and forming their own conception of what is reasonable, in all the circumstances of a given case, it is inevitable that the social philosophy and the scale of values of the Judges participating in the decision should play an important part, and the limit to their interference with legislative judgment in such cases can only be dictated by their sense of responsibility and self-restraint and the sobering reflection that the Constitution is meant not only for people of their way of thinking but for all, and that the majority of the elected representatives of the people have, in authorising the imposition of the restrictions, considered them to be reasonable. *The State of Madras* v. *V. G. Row*,

A I R 1952 S C 196 =1952 S C R 597=1952 SC J 253.

(304) *Arts. 19 (1) (g), (6) & 32 — Reasonable restriction — What is not — Illegal impost.*

There is a difference between a tax like the income-tax and a license fee for carrying on a business. A license fee on a business not only takes away the property of the licensee but also operates as a restriction on his right to carry on his business, for without payment of such fee the business cannot be carried on at all. If the license fee cannot be justified on the basis of any valid law no question of its reasonableness can arise, for an illegal impost must at all times be an unreasonable restriction and will necessarily infringe the right of the citizen to carry on his occupation, trade or business under Article 19 (1) (g) and such infringement can properly be made the subject-matter of a challenge under Article 32 : A. I. R. 1951 S. C. 97, *Disting. Mohammed Yasin* v. *Town Area Committee Jalalabad*,

A I R 1952 S C 115 = 1952 S C R 572=1952 S C J 162.

(305) *Art. 19 (6) — 'Reasonable restrictions' — Meaning of — Determination of, by Legislature — If final.*

The phrase "reasonable restriction" in Art. 19 (6) connotes that the limitation imposed on a person in enjoyment of the right should not be arbitrary or of an

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excessive nature, beyond what is required in the interests of the public. The word "reasonable" implies intelligent care & deliberation, that is the choice of a course which reason dictates. Legislation which arbitrarily or excessively invades the right cannot be said to contain the quality of reasonableness & unless it strikes a proper balance between the freedom guaranteed in Art. 19 (1) (g) & the social control permitted by Cl. (6) of Art. 19, it must be held to be wanting in that quality.

The determination by the Legislature of what constitutes a reasonable restriction is not final or conclusive; it is subject to the supervision by the Supreme Court. In the matter of fundamental rights, the Supreme Court watches & guards the rights guaranteed by the Constitution & in exercising its functions it has the power to set aside an Act of the Legislature if it is in violation of the freedoms guaranteed by the Constitution. *Chintamanrao* v. *State of M. P.*,

A I R 1951 S C 118 = 1950 S C J 571=1950 S C R 759.

(306) *Art. 19 (5) — Reasonable restrictions — Meaning — Power of Court.*

Per *Kania C. J.* — Clause (5) of Art. 19 must be given its full meaning. The question which the Court has to consider is whether the restrictions put by the impugned legislation on the exercise of the right are reasonable or not. The question whether the provisions of the Act provide reasonable safeguards against the abuse of the power given to the executive authority to administer the law is not relevant for the true interpretation of the clause. The Court, on either interpretation, will be entitled to consider whether the restrictions on the right to move throughout India, i. e., both as regards the territory and the duration, are reasonable or not. The law providing reasonable restrictions on the exercise of the right conferred by Art. 19 may contain substantive provisions as well as procedural provisions. While the reasonableness of the restrictions has to be considered with regard to the exercise of the right, it does not necessarily exclude from the consideration of the Court the question of reasonableness of the procedural part of the law. It is obvious that if the law prescribes five years externment or ten years externment, the question whether such period of externment is reasonable, being the substantive part, is

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necessarily for the consideration of the Court under cl. (5). Similarly, if the law provides the procedure under which the exercise of the right may be restricted, the same is also for the consideration of the Court, as it has to determine if the exercise of the right has been reasonably restricted. By this interpretation the scope and ambit of the word "reasonable" as applied to restrictions on the exercise of the right, is not in any way unjustifiably enlarged. It seems that the narrow construction sought to be put on the expression, to restrict the Court's power to consider only the substantive law on the point, is not correct.

Per *B. K. Mukherjea J.* — Though in cl. (5) the adjective 'reasonable' is predicated of the restrictions that are imposed by law and not of the law itself, that does not mean that in deciding the reasonableness or otherwise of the restrictions, the Courts have to confine themselves to an examination of the restrictions in the abstract with reference merely to their duration or territorial extent, and that it is beyond their province to look up to the circumstances under which or the manner in which the restrictions have been imposed. It is not possible to formulate an effective test which would enable the Courts to pronounce any particular restriction to be reasonable or unreasonable *per se*. All the attendant circumstances must be taken into consideration and one cannot dissociate the actual contents of the restrictions from the manner of their imposition or the mode of putting them into practice. The question of reasonableness of the restrictions imposed by a law may arise as much from the substantive part of the law as from its procedural portion. *N. B. Khare* v. *State of Delhi*,

A I R 1950 S C 211 = 1950 S C J 328 = 1950 S C R 519.

—Art. 20.

See also, A. I. R. 1954 S. C. 229 under Influx from Pakisthan Control Act.

(307) *Art. 20 (1) — Object.*

Article 20 (1) in its broad import has been enacted to prohibit convictions and sentences under 'ex post facto' laws. This article must be taken to prohibit all convictions or subjections to penalty after the Constitution in respect of 'ex post facto' laws whether the same was a post-Constitution law or a pre-Constitution law.

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(Difference between Art. 20 (1) and Ss. 9 (3) and 10 of Art. 1 of the American Constitution pointed out. *Shiv Bahadur Singh* v. *State of V. P.*,

A I R 1953 S C 394.

(308) *Art. 20 (1) — Scope.*

What is prohibited under Art. 20 is only conviction or sentence under an 'ex post facto' law and not the trial thereof. Such trial under a procedure different from what obtained at the time of the commission of the offence or by a Court different from that which had competence at the time cannot 'ipso facto' be held to be unconstitutional. A person accused of the commission of an offence has no fundamental right to trial by a particular Court or by a particular procedure, except in so far as any constitutional objection by way of discrimination or the violation of any other fundamental right may be involved. *Shiv Bahadur Singh* v. *State of V. P.*,

A I R 1953 S C 394.

(309) *Art. 20 (1) — "Law in force", meaning of — (Words and phrases — "Law in force.")*

The phrase "law in force" as used in Art. 20 (1) must be understood in its natural sense as being the law in fact in existence and in operation at the time of the commission of the offence as distinct from the law "deemed" to have become operative by virtue of the power of legislature to pass retrospective laws. *Shiv Bahadur Singh* v. *State of V. P.*,

A I R 1953 S C 394.

(310) *Art. 20 (1) — Applicability — Indian Penal Code (Application to Vindhya Pradesh) Ordinance (48 of 1949), Ss. 2 and 3 (1).*

In determining the constitutionality of any conviction under Vindhya Pradesh Ordinance 48 of 1949, for an alleged offence committed during the period between 9.8.1948 (the date from which the Penal Code was deemed to have been in force in Vindhya Pradesh) and 11.9.1949 (the date of the enactment of the said Ordinance), what is relevant for the application of Art. 20 (1) is not the result brought about by repeal and the retrospective operation thereof, but the factual state of law as it existed prior to the date (viz., 11.9.1949) when the repeal came into operation. The repeal itself posits the pre-existence of the

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law, and it is that law which is relevant for that purpose. *Shiv Bahadur Singh* v. *State of V. P.*, A I R 1953 S C 394.

(311) *Arts. 20 and 14 — West Bengal Criminal Law Amendment (Special Courts) Act (21 of 1949), Ss. 4 and 9 (1) —Section 4 does not violate Art. 14 of the Constitution and is constitutional — Sentence under S. 9 (1) being in violation of Art. 20 of the Constitution set aside.*

The equal protection of the laws guaranteed by Art. 14 of the Constitution does not mean that all laws must be general in character and universal in application and that the State is no longer to have the power of distinguishing and classifying persons or things for the purposes of legislation. To put it simply, all that is required in class or special legislation is that the legislative classification must not be arbitrary but should be based on an intelligible principle having a reasonable relation to the object which the legislature seeks to attain. If the classification on which the legislation is founded fulfils this requirement, then the differentiation which the legislation makes between the class of persons or things to which it applies and other persons or things left outside the purview of the legislation cannot be regarded as a denial of the equal protection of the law, for, if the legislation were all embracing in its scope, no question could arise of classification being based on intelligible differentia having a reasonable relation to the legislative purpose.

Article 14 does not insist that legislative classification should be scientifically perfect or logically complete.

There are cases where the legislature itself makes a complete classification of persons or things and applies to them the law which it enacts, and others where the legislature merely lays down the law to be applied to persons or things answering to a given description or exhibiting certain common characteristics, but being unable to make a precise and complete classification, leaves it to an administrative authority to make a selective application of the law to persons or things within the defined group, while laying down the standards or at least indicating in clear terms the underlying policy and purpose, in accordance with, and in fulfilment of, which the administrative authority is expected to select the persons

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or things to be brought under the operation of the law.

Whether an enactment providing for special procedure for the trial of certain offences is or is not discriminatory, and violative of Art. 14 must be determined in each case as it arises, for, no general rule applicable to all casess can safely be laid down.

In order to see whether S. 4, West Bengal Criminal Law Amendment (Special Courts) Act 1949 violates Art. 14, the real issue to be considered is whether having regard to the underlying purpose and policy of the Act as disclosed by its title, preamble and provisions, the classification of the offences, for the trial of which the Special Court is set up and a special procedure is laid down, can be said to be unreasonable or arbitrary and therefore, violative of the equal protection clause.

(*Held* after considering the background of the legislation and its preamble, purpose and the provisions that the system of Special Courts to deal with the special types of offences under a shortened and simplified procedure was devised, to meet the situation and that the legislation in question was based on a perfectly intelligible principle of classification having a clear and reasonable relation to the object sought to be attained).

Section 4 of the Act, therefore, is constitutionally valid and the Special Court had jurisdiction to try and convict the accused. A. I. R. 1952 S. C. 75, *Discussed and distinguished*. A. I. R. 1952 S C 123, *Discussed and applied. Case law referred.*

Sentence of compensatory fine under S. 9 (1) was set aside being in violation of Art. 20 of the Constitution. A. I. R. 1953 S. C. 394, *Rel. on.*

Per *Bose J.*—(Dissentient) : In so far as the Act makes provision for the setting up of Special Courts and of Special Judges, and in so far as it selects classes of offences which can be tried by them, it is good. Where, it is bad is, in S. 4 (1) where it empowers the Provincial Government to pick out cases from among the specified classes and to send them to Special Courts and thus discriminate between man and man in the same class.

On the question of punishment also there is discrimination but that is severable and

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would in any event be covered by Art. 20. *Kedar Nath* v. *State of West Bengal*,
A I R 1953 S C 404=1953 S C J 580.

(312) *Art. 20 (2) — "Prosecuted and punished"—Limited scope of article.*

The ambit and contents of the guarantee of the fundamental right given in Art. 20 (2) are much narrower than those of the Common Law rule in England or the doctrine of "Double Jeopardy" in the American Constitution. Article 20 (2) of the Constitution of India does not contain the principle of "autrefois acquit". In order to enable a citizen to invoke the protection of cl. (2) of Art. 20 of the Constitution, there must have been both prosecution and punishment in respect of the same offence. The words "prosecuted and punished" are to be taken not distributively so as to mean prosecuted or punished. Both the factors must co-exist in order that the operation of the clause may be attracted. *S. A. Venkataraman* v. *Union of India*,
A I R 1954 S C 375 (377) =1954 S C J 461.

See also Maqbul Hussain's case,
A I R 1953 S C 325.

(313) *Art. 20 (2) — "Prosecuted and punished" — Gold confiscated under Sea Customs Act (1878), S. 167 (8) — Prosecution under Foreign Exchange Regulation Act (1947), S. 23, not barred—(Criminal P. C. (1898), S. 403.)*

The Sea Customs Authorities are not a judicial tribunal and the adjudging of confiscation, increased rate of duty or penality under the provisions of the Sea Customs Act do not constitute a judgment or order of a Court or judicial tribunal necessary for the purpose of supporting a plea of double jeopardy. A. I. R. 1922 Bom. 30, *Ref.*

Hence when the Customs Authorities confiscate the gold brought in India in contravention of a notification of the Government of India neither the proceedings taken before the Sea Customs Authorities constitute a prosecution of the persons from whom it is confiscated nor does the order of confiscation constitute a punishment inflicted by a Court or judicial tribunal on that person. Such person cannot be said by reason of these proceedings before the Sea Customs Authorities to have been "prosecuted and punished" for the same offence with which he is later on charged before the Magistrate, in the complaint which is filed against him

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under S. 23 of the Foreign Exchange Regulation Act, 1947, *Maqbool Hussain* v. *State of Bombay*,
A I R 1953 S C 325 =1953 S C R 730=1953 S C J 456.

(314) *Art. 20 (2) — "Prosecuted", meaning of.*

If there is no punishment for the offence as a result of the prosecution, the sub-cl. (2) of Art. 20 has no application; and secondly, an appeal against an acquittal wherever such is provided by the procedure is in substance a continuation of the prosecution. *Kalawati* v. *Him. Pra.*,
A I R 1953 S C 131 =1953 S C R 546=1953 S C J 144.

(315) *Article 20 (2)—Principle of.*

The roots of the principle, which Art. 20 (2) enacts, are to be found in the well-established rule of English law which finds expression in the maxim "Nemo debet bis vexari"—a man must not be put twice in peril for the same offence. If a man is indicted again for the same offence in an English Court, he can plead, as a complete defence, his former acquittal or conviction, or as it is technically expressed, take the plea of "autrefois acquit" or "autrefois convict". *S. A. Venkataraman* v. *Union of India*, **A I R 1954 S C 375 (377) =1954 S C J 461.**

(316) *Art. 20 (2) — Principle underlying Art. 20 (2) and its scope — Criminal P. C. (1898), S. 403.*

Article 20 (2) incorporates within its scope the plea of "Autrefois convict" as known to the British jurisprudence or the plea of double jeopardy as known to the American Constitution but circumscribes it by providing that there should be not only a prosecution but also a punishment in the first instance in order to operate as a bar to a second prosecution and punishment for the same offence.

The words "before a Court of law or judicial tribunal" are not to be found in Art. 20 (2). But in order to invoke the protection of Art. 20 (2), there must have been a prosecution and punishment in respect of the same offence before a Court of law or a tribunal, required by law to decide the matters in controversy judicially on evidence on oath which it must be authorised by law to administer and not before a tribunal which entertains a departmental or an administrative enquiry even though

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set up by a statute but not required to proceed on legal evidence given on oath. The Article contemplates proceedings of the nature of criminal proceedings before a Court of law or a judicial tribunal and the prosecution in this context means an initiation or starting of proceedings of a criminal nature before such a Court or tribunal in accordance with the procedure prescribed in the statute which creates the offence and regulates the procedure. *Maqbool Hussain* v. *State of Bombay*,

A I R 1953 S C 325
=1953 S C R 730=1953 S C J 456.

(317) *Art. 20 (2) — Nature of proceedings contemplated by article, connotation of "prosecuted and punished" — Enquiry under Public Servants (Inquiries) Act is neither 'prosecution' nor 'punishment' — (Public Servants (Inquiries) Act (1850), S. 2).*

The language of Art. 20 and the words actually used in Art. 20 (2) afford a clear indication that the proceedings in connection with the prosecution and punishment of a person must be in the nature of a criminal proceeding, before a Court of law or judicial tribunal, and not before a tribunal which entertains a departmental or an administrative enquiry even though set up by a statute, but which is not required by law to try a matter judicially and on legal evidence.

It is true that the Commissioner appointed to make an enquiry under the Public Servants (Inquiries) Act, 1850 is invested with some of the powers of a Court, particularly in the matter of summoning witnesses and compelling the production of documents and the report, which he has to make, has to be made on legal evidence adduced under sanction of oath and tested by cross-examination. But from these facts alone the conclusion does not necessarily follow that an enquiry made and concluded under that Act amounts to prosecution and punishment for an offence as contemplated by Art. 20 (2) of the Constitution.

The words "prosecution" and "punishment" have no fixed connotation and they are susceptible of both a wider and a narrower meaning; but in Art. 20 (2) both the words have been used with reference to an "offence" and the word "offence" has to be taken in the sense in which it is used in General Clauses Act as meaning "an act or

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omission made punishable by any law for the time being in force." It follows that the prosecution must be in reference to the law which creates the offence and the punishment must also be in accordance with what that law prescribes.

In an enquiry under the Public Servants (Inquiries) Act of 1850, there is neither any question of investigating an offence in the sense of an act or omission punishable by any law for the time being in force, nor is there any question of imposing punishment prescribed by the law which makes that act or omission an offence. *S. A. Venkataraman* v. *Union of India*,

A I R 1954 S C 375 (377, 378,379)
= 1954 S C J 461.

(318) *Arts. 20 (2) and 21 — Action of Jail Superintendent—Procedure established by law — (Punjab Communist Detenus Rules, (1950), R. 41).*

The scheme of R. 41 is to constitute the Jail Superintendent only an administrative authority to maintain jail discipline and inflict summary punishment on the detenus for breach of that discipline by committing a jail offence. It is only when the Jail Superintendent considers that the offence is not adquately punishable by him that he can send the case to the Magistrate. If he actually himself punishes he cannot under this rule, refer the case again to the Magistrate. A reference by him after punishment will be wholly unauthorised and without jurisdiction and the prosecution before the Magistrate would be illegal and not in accordance with procedure established by law. *Maqbool Hussain* v. *State of Bombay*,

A I R 1953 S C 325
=1953 S C R 730=1953 S C J 456.

(319) *Art. 25 (3) — Applicability — (Criminal P. C., S. 164).*

Sub-cl. (3) of Art. 20 does not apply at all to a case where the confession is made without any inducement, threat or promise. It is true that a retracted confession has only little value as the basis for a conviction, and that the confession of one accused is not evidence against co-accused tried jointly for the same offence, but can only be taken into consideration against him; but this deals with its probative value and has nothing to do with any repugnancy to the Constitution. *Kalawati* v. *Himachal Pradesh*,

A I R 1953 S C 131
=1953 S C R 546=1953 S C J 144.

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(320) *Article 20 (3) – Principle underlying—Scope and extent of fundamental right indicated.*

Article 20 (3) embodies the principle of protection against compulsion of self-incrimination which is one of the fundamental canons of the British system of criminal jurisprudence and which has been adopted by the American system and incorporated as an article of its Constitution. It has also, to a substantial extent, been recognised in the Anglo Indian administration of criminal justice in this country by incorporation into various statutory provisions.

So far as the Indian Law is concerned, it may be taken that the protection against self incrimination continue more or less as in the English common law, so far as the accused and production of documents are concerned, but that it has been modified as regards oral testimony of witnesses, by introducing compulsion and providing immunity from prosecution on the basis of such compelled evidence.

Analysing the terms in which this fundamental right has been declared in our Constitution, it may be said to consist of the following components: (1) It is a right pertaining to person "accused of an offence," (2) it is a protection against "compulsion to be a witness" and (3) it is a protection against such compulsion resulting in his giving evidence "against himself."

Broadly stated the guarantee in Art. 20 (3) is against "testimonial compulsion." But there is no reason to confine it to the oral evidence of a person standing his trial for an offence when called to witness-stand. The protection afforded to an accused in so far as it is related to the phrase "to be a witness" is not merely in respect of testimonial compulsion in the Court room but may well extend to compelled testimony previously obtained from him. It is available, therefore, to a person against whom a formal accusation relating to the commission of an offence has been levied which in the normal course may result in prosecution.

Considered in this light, the guarantee under Art. 20 (3) would be available to persons against whom a First Information Report has been recorded as accused therein. It would extend to any compulsory process for production of evidentiary documents which are reasonably likely to support a

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prosecution against them. *M. P. Sharma* v. *Satis Chandra*,

A I R 1954 S C 300 (302, 303, 304)
=1954 S C J 428.

(321) *Art. 20 (3) — Search and seizure of documents from accused, if amounts to infringement of fundamental right under Art. 20 (3), Criminal P. C. (1898), Ss. 94 and 96.*

Even assuming that S. 94, Criminal P. C. is applicable to an accused and also that there is an element of compulsion implicit in the process contemplated by S. 94, Ss. 94 and 96 (1) of the Criminal Procedure Code cannot be read as importing any statutory recognition of a theory that search and seizure of documents is compelled production thereof. Section 96 (1) has three alternatives and the requirement of previous notice or summons and the non-compliance with it or the likelihood of such non-compliance is prescribed only for the first alternative and not for the second or the third. A "general search" and a "search for a document or a thing not known to be in possession of any particular person" are not conditioned by any such requirement. Indeed in cases covered by the second alternative such a requirement cannot even be contemplated as possible. It would, therefore, follow that some at least of the searches within the scope of the second and third alternatives in S. 96 (1) would fall outside the constitutional protection of Art. 20 (3) an anomalous distinction for which no justification can be found on principle.

There is no basis in the Indian law for the assumption that a search or seizure of a thing or document is in itself to be treated as compelled production of the same. A notice to produce is addressed to the party concerned and his production in compliance therewith constitutes a testimonial act by him within the meaning of Art. 20 (3). But a search warrant is addressed to an officer of the Government generally a police officer. Neither the search nor the seizure are acts of the occupier of the searched premises. They are acts of another to which he is obliged to submit and are, therefore, not his testimonial acts in any sense.

A power of search and seizure is in any system of jurisprudence an overriding power of the State for the protection of social security and that power is necessarily regulated by law. When the Constitution

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makers have thought fit not to subject such regulation to constitutional limitations by recognition of a fundamental right to privacy, analogous to the American Fourth Amendment, there is no justification to import it, into a totally different fundamental right, by some process of strained construction. Nor it is legitimate to assume that the constitutional protection under Art. 20 (3) would be defeated by the statutory provisions for searches. 116 U S 616, *Discussed*.

Excepting in the limited class of cases falling under S. 165 of the Criminal Procedure Code, issue of a search warrant is normally the judicial function of the Magistrate. When such judicial function is interposed between the individual and the officer's authority for search, no circumvention thereby of the fundamental right is to be assumed. In the present set up of the Magistracy in this country, it is not infrequently that the exercise of this judicial function is liable to serious error but the existence of scope for such occasional error is no ground to assume circumvention of the constitutional guarantee.

Held, in the circumstances of the case that searches made in pursuance of warrants issued under S. 96, Criminal P. C. could not be challanged as illegal on the ground of violation of fundamental right under Art. 20 (3) of the Constitution. *M. P. Sarma* v. *Satish Chandra*,

AIR 1954 S C 300 (306, 307) =1954 S C J 428.

(321-A)—**Arts. 21 & 22.**

See also A I R 1953 S C 10, Under Abducted Persons (Recovery & Restoration) Act, 1949.

(322) *Art. 21 — "Procedure established by law" — Meaning — Procedure under S. 12 of Act 1951 — Validity — Public Safety — Preventive Detention (Amendment) Act (1951), S. 12.*

The expression "procedure established by law" means procedure prescribed by law. It is open to Parliament to change the procedure prescribed by S. 12 of Act IV (4) of 1950 by enacting a law and that procedure becomes the procedure established by law within the meaning of that expression in Art. 21 of the Constitution. Thus where the detention of the petitioners is by virtue of S. 12 of the amended Act a new detention under the amended Act, the procedure prescribed by the amended Act is the procedure established by law within the meaning of Art. 21. *S. Krishnan* v. *State of Madras*,

AIR 1951 S C 301=1951 S C J 453 =1951 S C R 621.

(323) *Art. 21—"Law", meaning of.*

Per *Kania C. J.*; *Patanjali Sastri*; *B. K. Mukherjea and Das JJ.*—The word "law" in Art. 21 has not been used in the sense of "general law" connoting what has been described as the principles of natural justice outside the realm of positive law. "Law" in that article is equivalent to State-made law. *Gopalan* v. *State of Madras*,

AIR 1950 S C 27=1950 S C J 174 =1950 SC R 88.

(324) *Art. 21 — "Established," meaning of.*

Per *Kania C. J.*—The word 'established' itself suggests an agency which fixes the limits. This agency can be either the Legislature or an agreement between the parties.

Per *B. K. Mukherjea J.* — The word 'established' ordinarily means 'fixed or laid down' and if 'law' means not any particular piece of law but the indefinite and indefinable principles of natural justice which underlie positive systems of law, it would not at all be appropriate to use the expression 'established' for natural law or natural justice cannot establish anything like a definite procedure. *Gopalan* v. *State of Madras*, **AIR 1950 S C 27 =1950 S C J 174=1950 S C R 88.**

(325) *Art. 21 — Provision made in, by constitution—Protection against infringements by executive or individuals.*

Per *Patanjali Sastri J.*—It is a misconception to think that constitutional safeguards are directed against individuals. They are as a rule directed against the State and its organs. Protection against violation of the rights by individuals must be sought in the ordinary law. Article 21 is not designed to afford protection against infringements by the executive or the individuals. The insertion of a declaration of Fundamental Right in the forefront of the Constitution, coupled with an express prohibition against legislative interference with these right (Art. 13) and the provision of a constitutional sanction for the enforcement of such non interference by means of a judicial review (Art. 32) is a clear and emphatic indication that these rights are to be

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paramount to ordinary State-made laws. *Gopalan* v. *State of Madras*,

A I R 1950 S C 27=1950 S C J 174 =1950 S C R 88.

(326) *Art. 21—Application of.*

Per *Patanjali Sastri J.* — Article 21 is applicable to preventive detention. *Gopalan* v. *State of Madras*,

A I R 1950 S C 27 (Sup).

(327) *Art. 21* — "*Procedure established by law*".

Per *Kania C. J.; Patanjali Sastri; B. K. Mukherjea and Das JJ. (Fazl Ali J. Contra).*—"Procedure established by law" means procedure prescribed by the law of the state. These words are to be taken to refer to a procedure which has a statutory origin, for no procedure is known or can be said to have been established by such vague and uncertain concepts as "the immutable and universal principles of natural justice." *Gopalan* v. *State of Madras*,

A I R 1950 S C 27=1950 S C J 174 =1950 S C R 88.

(328) *Arts. 21, 22 — Scope — Duty of Court in interpreting the Articles.*

Per *Bose J.* — Arts. 21 and 22 confer a fundamental right and give a fundamental guarantee. It is therefore the duty of the Court to see that the right is kept fundamental and that the fullest scope is given to the guarantee. It is the duty of the Court to ensure that the right and the guarantee are not rendered illusory and meaningless. Therefore, wherever there is scope for difference of opinion on a matter of interpretation in this behalf, the interpretation which favours the subject must always be used because the right has been conferred upon him and it is the right which has been made fundamental, not the fetters and limitations with which it may be circumscribed by legislative action. *S. Krishnan* v. *State of Madras*, **A I R 1951 S C 301 =1951 S C J 453=1951 SCR 621.**

(328-A) **Art. 22.**

See also A. I. R. 1954 S. C. 179
A. I. R. 1953 S. C. 451
A. I. R. 1952 S. C. 350
A. I. R. 1952 S. C. 106, under Public Safety.

(329) *Art. 22—Justiciability of—Sufficiency of particulars.*

The sufficiency of the particulars conveyed to a detenu in accordance with the provision embodied in Article 22 (5) of the

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Constitution is a justiciable issue, the test being whether they are sufficient to enable the detenu to make an effective representation. *Shibban Lal Saksena* v. *State of Uttar Pradesh*, **A I R 1954 S C 179 (180) =1954 S C R 418=1954 S C J 73.**

(330) *Arts. 22, 246, Sch. 7, List 1, Entry 9, and List III, entry 3 — Preventive detention — Power of Parliament to enact law.*

Bearing in mind the provisions of Art. 22 read with Art. 246 and Sch. 7, List 1, Entry 9, and List III, entry 3, it is clear that the Parliament is empowered to enact a law of preventive detention (a) for reasons connected with defence, (b) for reasons connected with foreign affairs, (c) for reasons connected with the security of India and (under list III), (d) for reasons connected with the security of State, (e) for reasons connected with the maintenance of public order or (i) for reasons connected with the maintenance of supplies and services essential to the community. *Gopalan* v. *State of Madras*,

A I R 1950 S C 27=1950 S C J 174 =1950 S C R 88.

(331) *Art. 22, Cls. (1) and (2)—Arrest of person—Procedure to be followed on.*

Per *Das J.*—Clauses (1) and (2) of Art. 22 lay down the procedure that has to be followed when a man is arrested. They ensure four things, (a) right to be informed regarding grounds of arrest, (b) right to consult, and to be defended by a legal practitioner of his choice, (c) right to be produced before a Magistrate within 24 hours and (d) freedom from detention beyond the said period except by order of the Magistrate. *Gopalan* v. *State of Madras*.

A I R 1950 S C 27 =1950 S C J 174=1950 S C R 88.

(332) *Article 22 (2)—Detention without authority of Magistrate.*

A Petition under Article 32 of the Constitution alleged that A was arrested in Bombay on the 11th March 1952 and taken in custody to Lucknow to be produced before the Speaker of the Uttar Pradesh Legislative Assembly to answer a charge of breach of privilege. He was not produced before a Magistrate within twentyfour hours of his arrest and was in detention in the Speaker's custody at Lucknow even at the time of petition: which fact was admitted by the State:

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Held that the peremptory provisions of Art. 22 (2) were contravened and that A was entitled to release. *Gunupati Keshavram Reddy* v. *Nafisul Hasan and the State of U. P.*

A I R 1954 S C 636 (637).

(333) *Art. 22 (4) (a) — "Such detention."*

Per *Fazi Ali J.*—The words "such detention" occurring at the end of Cl. (4) (a) of Art. 22 mean detention for a period longer than three months.

Per *Patanjali Sastri J.* Contra — The words "such detention" in sub-cl. (a) refer back to the preventive detention mentioned in cl. (4) and not to detention for a longer period than three months. *Gopalan* v. *State of Madras*,

A I R 1950 S C 27 =1950 S C J 174=1950 S C R 88.

(334) *Art. 22, Cls. (4) (a) and (7)—Cl. (7), whether is exception to cl. 4 (a).*

Per *Kania C. J. and Patanjali Sastri J.*—An attempt to correlate cl. (4) (a) and cl. 7 (a) as a rule and an exception respectively is opposed both to the language and the structure of those clauses. They are two alternatives provided by the constitution for making laws on preventive detention. *Gopalan* v. *State of Madras.*

A I R 1950 S C 27 =1950 S C J 174=1950 S C R 88.

(335) *Art. 22 (5)—Vagueness of grounds —(Public Safety— Preventive Detention Act (1950), S. 7).*

A layman who is not experienced in the interpretation of documents can hardly be expected without legal aid, which is denied to him, to interpret the grounds in the proper sense. It is, therefore, up to the detaining authority to make his meaning clear beyond doubt without leaving the person detained to his own resource for interpreting them. Otherwise such grounds would be regarded as vague so as to render it difficult, if impossible for the petitioner to make an adequate representation. *Dr. Ram Krishan Bhardwaj* v. *The State of Delhi.*

A I R 1953 S C 318.

(336) *Arts. 22 (5), 21—One or several grounds vague—Effect—(Public Safety—Preventive Detention Act (1950), S. 7).*

Preventive detention is a serious invasion of personal liberty and such meagre safeguards as the Constitution has provided against the improper exercise of the power

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must be jealously watched and enforced by the Court.

A petitioner has the right, under Art. 22 (5), to be furnished with particulars of the grounds of his detention sufficient to enable him to make a representation which on being considered may give relief to him. The constitutional requirement must be satisfied with respect to each of the grounds communicated to the person detained, subject of course to a claim of privilege under Cl. 6 of Art. 22. Where it has not been done in regard to one of the grounds mentioned in the statement of grounds, the petitioner's detention cannot be held to be in accordance with the procedure established by law within the meaning of Art. 21 and he is, therefore, entitled to be released: A. I. R, 1951 S. C. 157, *Rel. on. Dr. Ram Krishan Bhardwaj* v. *The State of Delhi.*

A I R 1953 S C 318.

(337) *Art. 22 (5)—Particulars supplied to detenu—Jurisdiction of Court to test if they are sufficient when arises — Public safety — Preventive Detention Act (4 of 1950), S. 7.*

Per *Majority [Patanjali Sastri and Das JJ.* contra]—Article 22 (5) postulates two rights. The first part of Art. 22, cl. (5) gives a right to the detained person to be furnished with "the grounds on which the order has been made" and that has to be done "as soon as may be." The second right given to such person is of being afforded "the earliest opportunity of making a representation against the order." It is obvious that the grounds for making the order as mentioned above are the grounds on which the detaining authority was satisfied that it was necessary to make the order. These grounds, therefore, must be in existence when the order is made. The question whether such ground can give rise to the satisfaction required for making the order is outside the scope of the inquiry of the Court. But the question whether the vagueness or indefinite nature of the statement furnished to the detained person is such as to give him the earliest opportunity to make a representation to the authority is a matter within the jurisdiction of the Court's inquiry and subject to the Court's decision.

The conferment of the right to make a representation necessarily carries with it the obligation on the part of the detaining authority to furnish the grounds, i.e., mate-

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rials on which the detention order was made. Thus while there is a connection between the obligation on the part of the detaining authority to furnish grounds and the right given to the detained person to have an earliest opportunity to make the representation, the test to be applied in respect of the contents of the grounds for the two purposes is quite different. For the first, the test is whether it is sufficient to satisfy the authority. For the second the test is whether it is sufficient to enable the detained person to make the representation at the earliest opportunity. *State of Bombay* v. *Atma Ram*, A I R 1951 S C 157 =1951 S C J 208=1951 S C R 167.

(338) *Art. 22 (5)—Information conveyed to detenu—Nature of—Public safety—Preventive Detention Act (4 of 1950), S. 7.*

If the representation to be made by detenu contemplated by Art. 22 (5) has to be intelligible to meet the charges contained in the grounds, the information conveyed to the detained person must be sufficient to attain that object. Without getting information sufficient to make a representation against the order of detention it is not possible for the man to make the representation. Indeed the right will be only illusory but not a real right at all. The right to receive the grounds is independent but it is intentionally bound up and connected with the right to make the representation. *State of Bombay* v. *Atma Ram*,

A I R 1951 S C 157 =1951 S C J 208=1951 S C R 167.

(339) *Art. 22 (5) — Supplementary grounds—Connotation of — When do they infringe right given by Art. 22 (5)—Public safety — Preventive Detention Act (4 of 1950), S. 7. A I R (38) 1951 Bom 266,* REVERSED.

The adjective "supplementary" in the words "supplementary grounds" is capable of covering cases of adding new grounds to the original grounds, as also giving particulars of the facts which are already mentioned, or of giving facts in addition to the facts mentioned in the ground to lead to the conclusion of fact contained in the ground originally furnished. If by "supplementary grounds" is meant additional grounds, i. e., conclusions of fact required to bring about the satisfaction of the Government, the furnishing of any such additional grounds at a later

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stage will amount to an infringement of the first mentioned right in Art. 22 (5) as the grounds for the order of detention must be before the Government before it is satisfied about the necessity for making the order and all such grounds have to be furnished as soon as may be. The other aspects, viz., the second communication (described as supplement grounds) being only particulars of the facts mentioned or indicated in the grounds firstly supplied or being additional incidents which taken along with the facts mentioned or indicated in the ground already conveyed lead to the same conclusion of the fact, (which is the ground furnished in the first instance) stand on a different footing. These are not new grounds within the meaning of the first part of Art. 22 (5). Thus, while the first mentioned type of "additional" grounds cannot be given after the grounds are furnished in the first instance, the other types even if furnished after the grounds are furnished as soon as may be, but provided they are furnished so as not to come in conflict with giving the earliest opportunity to the detained person to make a representation, will not be considered an infringement of either of the rights mentioned in Art. 22 (5).

Having regard to this principle the summary rejection by a Court of the later communication solely on the ground that all materials in all circumstances must be furnished to the detenu when the grounds are first communicated, is not sound. A I R (38) 1951 Bom 266, REVERSED. *State of Bombay* v. *Atma Ram*,

A I R 1951 S C 157 (Supra).

(340) *Art. 22 (5) — Communication of grounds of detention—Sufficiency.*

(Per *Kania C. J., Patanjali Sastri and Das JJ.: — Mahajan and Bose JJ., Dissenting*)—To hold that Art. 22 (5) requires that, wherever, detention is grounded on alleged prejudicial speeches, the detaining authority should indicate to the person detained the passages which it regards as objectionable, would rob the provisions of the Act of much of their usefulness in the very class of cases where those provisions were doubtless primarily intended to be used and where their use would be most legitimate. Hence where an order of detention is based upon speeches made by the person sought to be detained, the detaining authority need not communicate to the person the offend-

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ing passages or even the gist of such passages on pain of having the order quashed if it did not. If the time and place at which the speeches were alleged to have been made are specified and their general nature and effect (being such as to excite disaffection between Hindus and Muslims) is also stated, these constitute sufficient particulars to enable the person to make his representation to the authority concerned, and the requirements of Art. 22 (5) are complied with.

Per *Mahajan J.*—The sufficiency of the material supplied is a justiciable issue, though the sufficiency of the grounds on which the detaining authority made up its mind is not a justiciable issue. In the absence of any indication in the grounds as to the nature of the words used by the detenus in their speeches from which an inference has been drawn against them they would not be able fully to exercise the fundamental right of making a representation and would not be able to furnish a proper defence to the charge made against them. A I R (38) 1951 S C 157, *Rel. on*

Per *Bose J.* — On the facts and circumstances of the present cases, the grounds supplied were insufficient and the gist of the offending passages should have been supplied. The omission to do so invalidates the detention. *Ram Singh* v. *State of Delhi*,

A I R 1951 S C 270
=1951 S C R 451=1951 S C J 371.

(341) *Art. 22 5)—"As soon as may be."*

Under the Bengal Criminal Law Amendment Act 1950, a very large number of persons were detained. The validity of that Act was being challenged in the Calcutta H. C. and the judgment was expected to be delivered towards the end of February 1950. The Preventive Detention Act (1950) was passed in the last week of February 1950 and the detention orders on all the detenus were served on 26-2-1950 :

Held, that having regard to the fact that the State Government had suddenly to deal with a large number of cases on one day it could not be said that the grounds of detention served on 14-3 1950 were not communicated "as soon as may be." *Tarapada De* v. *State of W. Bengal*,

A I R 1951 S C 174
=1951 S C J 233=1951 S C R 212.

(342) *Art. 22 (7)—Power under Art. 22 (7)—Limitation upon.*

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It cannot be said that once the power given under clause (7) to fix a maximum period has been exercised the power exhausts itself and cannot be exercised again in respect of the same detention. No such limitation is imposed upon Parliament by the Constitution. *Sham Rao* v. *District Magistrate Thana*, **A I R 1952 S C 324**
=1952 S C R 683=1952 S C J 476.

(343) *Art. 22 (7)—Scope—Does not confer legislative power— Period of detention prescribed by it can be altered by Parliament.*

Per *Mahajan J.*—The ambit of the legislative powers of Parliament is contained in Art. 245 of the Constitution read with the entries in Sch. 7. Art. 22 of the Constitution restricts these powers to a certain extent. It does not enlarge them. Clause 7, however, cuts down these restrictions to a certain extent. Parliament having power to make the law has also the power to alter or amend it, if it so chooses. It cannot, therefore, be argued that the Parliament has no authority to alter the period of one year prescribed under Art. 22 (7) (b) as the section does not confer any legislative power on Parliament. *S. Krishnan* v. *State of Madras*, **A I R 1951 S C 301**
=1951 S C J 453=1951 S C R 621.

(344) *Art. 22 (7) —Scope—Article whether confers fundamental right.*

Per *Mahajan J.* — If the Parliament by law under Art. 22 (7) prescribed a maximum period for which any person may be detained under any law providing for preventive detention, then that period does not become a part of the fundamental right conferred on a person under Part III of the Constitution. Art. 22 in cl. 7 does not confer a fundamental right on a person; on the other hand in its true concept, it restricts to a certain degree the measure of the fundamental right contained in cl. 4 (a) of the Article.

(Per *Bose J.*) — The provisions of cls. 4 (a), 4 (b) and 7 (b) of Art 22 confer a fundamental right not to be detained beyond a certain period. The extent of that period can vary but the maximum period of detention cannot exceed certain fixed limits. Those limits are (a) in the first instance, three months; if not (b) the maximum prescribed by the Parliament under sub-cl. 7 (b). No law can be made authorising detention either under sub cls. 4 (a), 4 (b) unless a maximum period of detention is

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prescribed by Parliament under sub-cl. 7 (b). *S. Krishnan* v. *State of Madras*,

A I R 1951 SC 301 =1951 S C J 453=1951 S C R 621.

(345) *Art. 22 (7) — 'And' — Meaning —Words and Phrases.*

(Majority view, Bose J. dissenting): Sub-cl. (a) of cl. (7) of Art. 22 being an enabling provision, the word 'and' should be understood in a disjunctive sense: A.I.R. (37) 1950 S C 27, *Rel. on. S. Krishnan* v. *State of Madras*,

A I R 1951 S C 301 =1951 S C J 453=1951 S C R 621.

(346) *Art. 22 (7)—Interpretation of.*

Per *Kania C. J.*— In the case of an Act of preventive detention passed by the Parliament cl.(7) of Art. 22 contained in the Chapter on Fundamental Rights, permits detention beyond a period of three months and excludes the necessity of consulting an Advisory Board, if the opening words of the sub-clause are complied with. Sub-clause (b) is permissive. It is not obligatory on the Parliament to prescribe any maximum period. *Gopalan* v. *State of Madras*,

A I R 1950 S C 27 =1950 S C J 174=1950 S C R 88.

(347) *Art. 22 (7)— Interpretation of — Real purpose and intention.*

Per *Mahajan J.* — The real purpose of cl. (7) of Art. 22 is to provide for a contingency where compulsory requirement of an Advisory Board may defeat the object of the law of preventive detention. This clause is incorporated in the Constitution to meet abnormal and exceptional cases, the cases being of a kind where an Advisory Board could not be taken into confidence. The authority to make such drastic legislation was entrusted to the supreme legislature but with the further safeguards that it can only enact a law of such a dratic nature provided it prescribed the circumstances under which such power had to be used or in the alternative it prescribed the classes of cases or stated a determinable group of cases in which this could be done. The intention was to lay down some objective standard for the guidance of the detaining authority on the basis of which without consultation of an Advisory Board detention could be ordered beyond the period of three months. *Gopalan* v. *State of Madras*,

A I R 1950 S C 27 =1950 S C J 174=1950 S C R 88.

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(348) *Art. 22 (7) (a) — "The circumstances under which, and the class or classes in which"—Sub-clause whether is conjunctive or disjunctive.*

Per *Kania C. J., Patanjali Sastri and Das JJ.* — The use of the word "which" twice in the first part of sub cl. (a) of cl. (7) read with the comma put after each, shows that the legislature wanted those to be read as disjunctive and not conjunctive. By cl. (7) (a) of Art. 22, as worded, the legislature intended that the power of preventive detention beyond three months may be exercised either if the circumstances in which or the class or classes of cases in which, a person is suspected or apprehended to be doing the objectionable things mentioned in the section.

Per *Fazl Ali and Mahajan JJ.* Contra —The provision clearly means that both the circumstances and the class or classes of cases (which are two different expressions with different meanings and connotations and cannot be regarded as synonymous, should be prescribed, and prescription of one without prescribing the other will not be enough. *Gopalan* v. *State of Madras*

A I R 1950 S C 27 (Supra).

(349) *Art. 22 (7) (a)—Parliament may prescribe either the circumstances or the classes of the cases of both — Preventive Detention Act. (1950). S. 12 (1).*

Per *Patanjli Sastri and Das JJ.*—Article 22 (7) (a) means that the Parliament may prescribe either the circumstances or the classes of cases or both, and in enacting S. 12, Preventive Detention Act, 1950, Parliament evidently regarded the matters mentioned in Cls. (a) and (b) of sub-clause (1) of that section as sufficiently indicative both of the circumstances under which and the classes in which a person could be detained for longer period, to say, for instance, that persons who are likely to act prejudicially to the defence of India may be detained beyond three months is at once to 'prescribe a class of persons in which' and 'the circumstances under which' a person may be detained for the longer period In other words, the classification itself may be such as to amount to a sufficient description of the circumstances for purpose of Clause (7).

Per *B. K. Mukherjea J.*—Sub-clause (a) of Art. 22 (7) lays down a purely enabling provision and Parliament, if it so chooses, may pass any legislation in terms of the

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same. Where an optional power is conferred on certain authority to perform two separate acts, ordinarily it would not be obligatory upon it to perform both; it may do either if it so likes. Here the classes have been specified and the classes apparently are composed of persons who are detained for the purpose of preventing them from committing certain apprehended acts. It is extremely doubtful whether the clauses themselves could be described as 'circumstances' as they purport to have been done in the section *Gopalan* v. *State of Madras*

A I R 1950 S C 27 (Supra).

(350) *Art. 22(7)(a)—Circumstances and class or classes—Meaning of — Preventive Detention Act (1950), S. 12 (1).*

Circumstances ordinarily mean events or situation extraneous to the actions of the individual concerned, while a class of cases means determinable groups based on the actions of the individuals with a common aim or idea. Determinable may be according to the nature of the object also. The classification can be by grouping the activities of people or by specifying the objectives to be attained or avoided. *Gopalan* v. *State of Madras*

A I R 1950 S C 27 (Supra).

(351) *Art. 25 (2) (a)—Scope.*

What sub-clause (a) of clause (2) of Art. 25 contemplates is not State regulation of the religious practices as such which are protected unless they run counter to public health or morality but of activities which are really of an economic, commercial or political character though they are associated with religious practices. *Ratilal Panachand Gandhi* v. *State of Bombay,*

A I R 1954 S C 388 (391)
=1954 S C J 480.

(352) *Art. 25—Religion—Its content and extent — (Words and Phrases — "Religion").*

Religion is not necessarily theistic; there are well known religions in India like the Buddhism and Jainism which do not believe in the existence of God or of any Intelligent First Cause. A religion has its basis in a system of beliefs and doctrines which are regarded by those who profess that religion to be conducive to their spiritual well being, but it is not correct to say that matters of religion are nothing but matters of religious

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faith and religious belief. It has its outward expression in acts as well.

The article protects acts done in pursuance of religious belief as part of religion. For, religious practices or performances of acts in pursuance of religious belief are as much a part of religion as faith or belief in particular doctrines. *Ratilal Panachand Gandhi* v. *State of Bombay,*

A I R 1954 S C 388 (392)
=1954 S C J 480.

See also Commissioner, Hindu Religious Endowments v. Sri Lakshmindra Tirtha Swamiar

A I R 1954 S C 282.

(353) *Art. 25 — Practice and propagation of religious tenets — Applicability of Art. 25 to Mathadhipati—(Hindu Law — Religious Endowment).*

A Mathadhipati is not a corporate body; he is the head of the spiritual fraternity and by virtue of his office has to perform the duties of a religious teacher. It is his duty to practice and propagate the religious tenets of which he is an adherent and if any provision of law prevents him from propagating his doctrine, that would certainly affect the religious freedom which is guaranteed to every person under Art. 25. Institutions, as such cannot practice or propagate religion; it can be done only by individual persons and whether these persons propagate their personal views or the tenets for which the institution stands is really immaterial for purposes of Art. 25. It is propagation of belief that is protected, no matter whether the propagation takes place in a church or monastery, or in a temple or parlour meeting. *Commr. H. R. E.* v. *L. T. Swamiar Madras*

A I R 1954 S C 282 (289)
=1954 S C J 335.

(354) *Art. 25—Religion, meaning of — (Words and phrases—"Religion".)*

Religion is a matter of faith with individuals or communities and it is not necessarily theistic. There are well known religions in India like Buddism and Jainism, which do not believe in God or in any intelligent First Cause. A religion undoubtedly has its basis in a system of beliefs or doctrines which are regarded by those who profess that religion as conducive to their spiritual well being, but it will not be correct to say that religion is nothing else but

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a doctrine of belief. A religion may not only lay down a code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion, and these forms and observances might extend even to matters of food and dress.

The guarantee under the constitution of India not only protects the freedom of religious opinion but it protects also acts done in pursuance of a religion and this is made clear by the use of the expression "practice of religion" in Art. 25. *Commr. H. R. E.* v. *L. T. Swamiar*,

A I R 1954 S C 282 (290)
= 1954 S C J 335

(355) *Arts. 25 and 26 — Fundamental rights and restrictions with respect to matters of religion.*

The language of Arts. 25 and 26 is sufficiently clear to enable the court to determine with the aid of foreign authorities as to what matters come within the purview of religion and what do not. Freedom of religion in the constitution of India is not confined to religious beliefs only; it extends to religious practices as well subject to the restrictions which the Constitution itself has laid down.

Under Art. 26 (b) therefore a religious denomination or organization enjoys complete autonomy in the matter of deciding as to what rites and ceremonies are essential according to the tenets of the religion they hold and no outside authority has any jurisdiction to interfere with their decision in such matters. Of course the scale of expenses to be incurred in connection with these religious observances would be a matter of administration of property belonging to the religious denomination and can be controlled by secular authorities in accordance with any law laid down by a competent legislature; for it could not be the injunction of any religion to destroy the institution and its endowments by incurring wasteful expenditure on rites and ceremonies.

However under Art. 26 (d) it is the fundamental right of a religious denomination or its representative to administer its properties in accordance with law; and the law, therefore, must leave the rights of administration to the religious denomination

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itself subject to such restrictions and regulations as it might choose to impose. A law which takes away the right of administration from the hands of a religious denomination altogether and vests it in any other authority would amount to a violation of the right guaranteed under cl. (d) of Art. 26. *Commr. H. R. E.* v. *L. T. Swamiar*,

A I R 1954 S C 282 (291)
= 1954 S C J 335

(356) *Art. 26 — Distinction between Art. 26 cl. (b) and following two cls. (c) and (d).*

Besides the right to manage its own affairs in matters of religion, which is given by Art. 26 cl. (b) the next two clauses of Art. 26 guarantee to a religious denomination the right to acquire and own property and to administer such property in accordance with law. The administration of its property by a religious denomination has thus been placed on a different footing from the right to manage its own affairs in matters of religion. The latter is a fundamental right which no legislature can take away, whereas the former can be regulated by laws which the legislature can validly impose. It is clear, therefore, that questions merely relating to administration of properties belonging to a religious group or institution are not matters of religion to which cl. (b) of the article applies. *Commr. H. R. E.* v. *L. T. Swamiar Madras*,

A I R 1954 S C 282 (289, 290)
= 1954 S C J 335

(357) *Art. 26—"Denomination" meaning of — Followers of the three Acharyas.*

The word "denomination" has been defined in the Oxford Dictionary to mean "a collection of individuals classed together under the same name; a religious sect or body having a common faith and organization and designated by a distinctive name". The practice of setting up Maths as centres of theological teaching was started by Shri Shankaracharya and was followed by various teachers since then. After Shankara came a galaxy of religious teachers and philosophers who founded the different sects and sub-sects of the Hindu religion. Each one of such sects or sub-sects can be called a religious denomination, as it is designated by a distinctive name—in many cases it is the name of the founder — and has a common faith and common spiritual organization. The fol-

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lowers of Ramanuja, who are known by the name of Shri Vaishnabas, constitute a religious denomination ; and so do the followers of Madhwacharya and other religious teachers. Further Art. 26 contemplates not merely a religious denomination but also a section thereof, the Math of the spiritual fraternity represented by it can legitimately come within the purview of this article. *Commrs. H. R. E.* v. *L. T. Swamiar*,

AIR 1954 S C 282 (289)=1954 SCJ 335.

(358) *Art. 26 (b) and (d)—Religion — Fundamental rights and restrictions with respect to religious matters.*

In regard to affairs in matters of religion, the right of management given to a religious body is a guaranteed fundamental right which no legislation can take away. On the other hand, as regards administration of property which a religious denomination is entitled to own and acquire. It has undoubtedly the right to administer such property but only in accordance with law. This means that the State can regulate the administration of trust properties by means of laws validly enacted; but under Art. 26 (3), it is the religious denomination itself which has been given the right to administer its property in accordance with any law which the State may validly impose. A law, which takes away the right of administration altogether from the religious denomination and vests it in any other or secular authority, would amount to violation of the right which is guaranteed by Art. 26 (d) of the Constitution. *Ratilal Panachand Gandhi and others* v. *State of Bombay and others*,

A I R 1954 S C 388 (391)
= 1954 S C J 480

(359) *Art. 26—Matters of religion and secular administration.*

The distinction between matters of religion and those of secular administration of religiou- properties may, at times, appear to be a thin one. But in cases of doubt, the Court should take a common sense view and be actuated by considerations of practical necessity. *Ratilal Panachand Gandhi and others* v. *State of Bombay and others*

A I R 1954 S C 388 (392)
=1954 S C J 480.

(360) *Art. 26 — Trust created for religious purposes— Right to spend trust property — Diversion of trust property — Infringement of fundamental right.*

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A religious sect or denomination has the undoubted right guaranteed by the Constitution to manage its own affairs in matters of religion and this includes the right to spend the trust property or its income for the religious purposes and objects indicated by the founder of the trust or established by usage obtaining in a particular institution. To divert the trust property or funds for purposes which an Authority created under a State Act or the Court considers expedient or proper, although the original objects of the founder can still be carried out, is an unwarrantable encroachment on the freedom of religious institutions in regard to the management of their religious affairs. *Ratilal Panachand Gandhi and others* v. *State of Bombay and others*

A I R 1954 S C 388 (394)
=1954 S C J 480.

(361) *Art. 26 (b)—What are matters of religion.*

What constitutes the essential part of a religion is primarily to be ascertained with reference to the doctrine of that religion itself. If the tenets of any religious sect of the Hindu prescribe that offerings of food should be given to the idol at particular hours of the day, that practical ceremonies should be performed in a certain way at certain periods of the year or that there should be duly recital of sacred texts or oblations to the sacred fire, all these will be regarded as parts of religion and the mere fact that they involve expenditure of money or employment or priests and servants or the use of marketable commodities will not make them secular activities partaking of a commercial or economic character; all of them are religious practices and should be regarded as matters of religion within the meaning of Art. 26 (b). *Commr. H. R. E.* v. *L. T. Swamiar*

A I R 1954 S C 282 (290)
=1954 S C J 335.

(362) *Art. 27 — Scope of—What is forbidden by Art. 27.*

What is forbidden by Art. 27 is the specific appropriation of the proceeds of any tax in payment of expenses for the promotion or manufacture of any particular religion or religious denomination. The reason underlying this provision is that India being a Secular State and there being freedom of religion guaranteed by the Constitution, both to individuals and groups, it

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is against the policy of the Constitution to pay out of public funds any money for the promotion or maintenance of any particular religion or religious denomination. *Commr. H. R. E.* v. *L. T. Swamiar*

A I R 1954 S C 282 (296)
=1954 S C J 335.

(363) *Arts. 27, 110 (a) and 265 — Distinction between tax and fee.*

A careful examination reveals that the element of compulsion of coerciveness is present in all kinds of imposition, though in different degrees and it is not totally absent in fees. This, therefore, cannot be made the sole or even a material criterion for distinguishing a tax from fees.

The distinction between a tax and a fee lies primarily in the fact that a tax is levied as a part of a common burden while a fee is a payment for a special benefit or privilege. Fees confer a capacity, although the special advantage, as for example, in the case of registration fees for documents or marriage licences, is secondary to the primary motive of regulation in the public interest. Public interest seems to be at the basis of all impositions, but in a fee it is some special benefit which the individual receives. It is the special benefit accruing to the individual which is the reason for payment in the case of fees, in the case of tax, the particular advantage if it exists at all is an incidental result of state action.

As fee is a sort of return or consideration for services rendered ; it is absolutely necessary that the levy of fees should on the face of the legislative provision, be correlated to the expense incurred by Government in rendering the service. If the money thus paid is set apart and appropriated specially for the performance of such work and is not merged in the public revenues for the benefit of the general public, it could be counted as fee and not a tax. There is really no generic difference between the tax and fees and the taxing power of a state may manifest itself in three different forms known respectively as special assessment, fees and taxes. *Commr. H. R. E.* v. *L. T. Swamiar*

A I R 1954 S C 282 (295, 296)
=1954 S C J 335.

(364) *Arts. 27, 110 (a) and 265 — Tax Indicia of.*

A tax is a compulsory exaction of money by public authority for public purposes enforceable by law and is not payment for

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services rendered. This definition brings out the essential characteristics of a tax as distinguished from other forms of imposition, which, in a general sense, are included within it. The essence of taxation is compulsion, that is to say, it is imposed under statutory power without the tax payers consent and the payment is enforced by law. The second characteristic of tax is that it is an imposition made for public purposes without reference to any special benefit to be conferred on the payer of the tax. This is expressed by saying that the levy of tax is for the purposes of general revenue, which when collected forms part of the public revenue of the State. As the object of a tax is not to confer any special benefit upon any particular individual there is no element of quid pro quo between the tax payer and the public authority. Another feature of taxation is that as it is a part of the common burden; the quantum of imposition upon the tax-payer depends generally upon his capacity to pay. *Commr. H. R. E.* v. *L. T. Swamiar*,

A I R 1954 S C 282 (295)
=1954 S C J 335.

(365) *Art. 27, Sch. VII List 1 entry 96, List 2 entry 66 and List 3 entry 47 "Fee" — Meaning of.*

A fee is generally defined to be a charge for a special service rendered to individuals by some governmental agency. The amount of fee levied is supposed to be based on the expenses incurred by the Government in rendering the service, though in many cases the costs are arbitrarily assessed. Ordinarily, the fees are uniform and no account is taken of the varying abilities of different recipients to pay. These are undoubtedly some of the general characteristics but as there may be various kind of fees, it is not possible to formulate a definition that would be applicable to all cases. *Commr. H. R. E.* v. *I. T. Swamiar*,

A I R 1954 282 (295)
=1954 S C J 335

(366) *Arts. 27, 110 (a) and 265 and Sch. VII List 3, Entry 47 — Distinction between tax and fee.*

A tax is in the nature of a compulsory exaction of money by a public authority for public purposes, the payment of which is enforced by law. The other characteristic of a tax is, that the imposition is made for public purpose to meet the general expenses

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of the State without reference to any special advantage to be conferred upon the payers of the tax. Thus, although a tax may be levied upon particular classes of persons or particular kinds of property, it is imposed not to confer any special benefit upon individual persons and the collections are all merged in the general revenue of the State to be applied for general public purposes. Tax is a common burden and the only return which the tax payer gets is participation in the common benefits of the State.

Fees are payments primarily in the public interest, but for some special service rendered or some special work done for the benefit of those from whom the payments are demanded. Thus in fees there is always an element of 'quid pro quo' which is absent in a tax. In order that the collections made by the Government can rank as fees, there must be correlation between the levy imposed and the expenses incurred by the State for the purpose of rendering such services. Thus two elements are essential in order that a payment may be regarded as a fee. In the first place, it must be levied in consideration of certain services which the individuals accepted either willingly or unwillingly and in the second place, the amount collected must be ear-marked to meet the expenses of rendering these services and must not go to the general revenue of the State to be spent for general public purposes.

However, too much stress should not be laid on the presence or absence of what has been called the 'coercive' element. It is not correct to say that as distinguished from taxation which is compulsory payment, the payment of fees is always voluntary'. It being a matter of choice with individuals either to accept the service or not for which fees are to be paid. *Ratilal Panachand Gandhi and others* v. *State of Bombay and others*,

A I R 1954 S C 388 (395)
= 1954 S C J 480

See also Commissioner, Hindu Religious Endowments v. *Lakshmindra Tirtha Swamiar*,

A I R 1954 S C 282.

(367) *Arts. 27 & 265 Sch. VII List I Item 96, List II Item 66, List III.*

There is no generic difference between a tax and a fee and both are different forms in which the taxing power of a State manifests itself. Our Constitution, however, has

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made a distinction between a tax and a fee for legislative purposes and while there are various entries in the three lists with regard to various forms of taxation, there is an entry at the end of each one of these lists as regards fees which could be levied in respect of every one of the matters that are included therein. A tax is undoubtedly in the nature of a compulsory exaction of money by a public authority for public purposes, the payment of which is enforced by law. But the essential thing in a tax is that the imposition is made for public purposes to meet the general expenses of the State without reference to any special benefit to be conferred upon the payers of the tax. The taxes collected are all merged in the general revenue of the State to be applied for general public purposes. Thus, tax is a common burden and the only return which the tax-payer gets is the participation in the common benefits of the State. Fees, on the other hand, are payments primarily in the public interests but for some special service rendered or some special work done for the benefit of those from whom payments are demanded. Thus, in fees there is always an element of 'quid pro quo' which is absent in a tax. Two elements are thus essential in order that a payment may be regarded as a fee. In the first place, it must be levied in consideration of certain services which the individuals accepted either willingly or unwillingly. But this by itself is not enough to make the imposition a fee, if the payments demanded for rendering of such services are not set apart or specifically appropriated for that purpose, but are merged in the general revenue of the State to be spent for general public purposes. *Sri Jagannath Ramanuj Das and another* v. *State of Orissa and another*,

A I R 1954 S C 400 (403).

See also : Rati Lal Panachand Gandhi, v. State of Bombay.

A I R 1954 S C 388 (395).

(368) *Art. 29 (1) & 30 (1) — Power of State to determine medium of instruction.*

Where a minority, like the Anglo-Indian community, which is based, inter alia, on religion and language, has the fundamental right to conserve its language, script, culture under Art. 29 (1) and has the right to establish and administer educational institutions of their choice under Art. 30

(1), surely then there must be implicit in such fundamental right, the right to impart instruction in their own institutions to the children of their own community in their own language. To hold otherwise will be to deprive Art. 29 (1) and Art. 30 (1) of the greater parts of their contents. Such being the fundamental right, the police power of the State to determine the medium of instruction must yield to this fundamental right to the extent it is necessary to give effect to it and cannot be permitted to run counter to it. *State of Bombay* v. *Bombay Education Society & others*,

A I R 1954 S C 561 (568, 569) = 1954 S C J 678.

(369) *Art. 29 (2) and 337, Proviso 2 — Government Circular order — Admission to Anglo-Indian Schools — Restriction — Constitutionality.*

On 6.1.1954 the Government of Bombay issued a circular directing in Cl. 5 that "no primary or secondary school shall from the date of these orders admit to a class where English is used as a medium of instruction any pupil other than pupil belonging to a section of citizens the language of which is English namely, Anglo-Indians and citizens of non-Asiatic descent". In Cl. 7 of the Circular all schools using English as a medium of instructions were "advised to open progressively divisions of standards using Hindi or an Indian language as the medium of instruction, starting from Standard I in 1954". One of the Anglo-Indian Schools affected by the circular having applied for the issue of a writ of mandamus against the State Government preventing it from enforcing the said circular order against it :

Held that ordinarily the word "namely" imports enumeration of what is comprised in the preceding clause. In other words, it ordinarily serves the purpose of equating what follows with the clause described before. Therefore relying on the word "namely" in Cl. 5 it could not be contended that the clause did not limit admission only to Anglo-Indians and citizens of non-Asiatic descent, but permitted admission of pupils belonging to any other section of citizens the language of which is English.

(2) that assuming that the contention was true, even then, citizens, whose language was not English were certainly debarred by the order from admission to a school where English was used as a medium of instruction in all the classes.

(3) that granting that the object of the order was to promote advancement of the national language, the object was sought to be achieved by denying to all pupils, whose mother tongue was not English, admission into any school where the medium of instruction was English.

(4) that, therefore, the order offended against the fundamental right guaranteed to all citizens by Art. 29 (2).

(5) that whether Cl. 7 of the order was treated as operative or merely as advice, in either view of the matter the order could not be regarded as unconstitutional in view of Proviso 2 to Art. 337. *State of Bombay* v. *Bombay Education Society and others*,

A I R 1954 S C 561 (565, 568, 569) = 1954 S C J 678.

(370) *Arts. 29 (2) & 15 — Distinction between — Art. 29 (2) not limited to minority group — Marginal note.*

Article 29 (2) is not limited to citizens belonging to a minority group other than the section or the minorities referred to in Art. 29 (1) or Art. 30 (1), for the citizens, who do not belong to any minority group, may quite conceivably need this protection just as much as the citizens of such minority groups. The language of Article 29 (2) is wide and unqualified and may well cover all citizens whether they belong to the majority or minority group. Article 15 protects all citizens against the State whereas the protection of Article 29 (2) extends against the State or any body who denies the right conferred by it. Further Art. 15 protects all citizens against discrimination generally but Art. 29 (2) is a protection against a particular species of wrong namely denial of admission into educational institutions of the specified kind. In the next place Art. 15 is quite general and wide in its terms and applies to all citizens, whether they belong to the majority or minority groups, and gives protection to all the citizens against discrimination by the State on certain specific grounds. Article 29 (2) confers a special right on citizens for admission into educational institutions maintained or aided by the State. To limit this right only to citizens belonging to minority groups will be to provide a double protection for such citizens and to hold that the citizens of the majority group have

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no special educational rights in the nature of a right to be admitted into an educational institution for the maintenance of which they make contributions by way of taxes. There is no cogent reason for such discrimination. The original note alone cannot be read as controlling the plain meaning of the language in which Art. 29 (2) has been couched. *State of Bombay* v. *Bombay Education Society and others*,

A I R 1954 S C 561 (566) =1954 S C J 678.

(371) *Arts. 29 (2) and 46— Communal G. O. fixing proportionate seats for different communities in State colleges—Validity.*

The Chapter of Fundamental Rights is sacrosant & not liable to be abridged by any legislative or executive act or order, except to the extent provided in the appropriate Art. in Part III. The directive principles of State policy cannot override the provisions found in Part III but have to conform to & run as subsidiary to the Chapter of Fundamental Rights. Hence, the argument that having regard to the provisions of Art. 46, the State is entitled to maintain the Communal G. O. fixing proportionate seats in State Colleges for different communities and if as a result certain individual citizens are unable to get admissions into the educational institutions, there is no infringement of their fundamental rights cannot be sustained.

The classification in the said Communal G. O. proceeds on the basis of religion, race and caste and is opposed to the Constitution and constitutes a clear violation of the fundamental rights guaranteed to the citizen under Art. 29 (2).

However, so long as there is no infringement of fundamental rights as conferred by Part III of the Constitution there can be no objection to the State acting according to the directive principles set out in Part IV subject to the legislative and executive powers and limitations conferred on the State under different provisions of the Constitution. *State of Madras* v. *Sm. Champakam Dorairajan*

A I R 1951 S C 226 =1951 S C J 313=1951 S C R 525.

(371-A) Article 31:

Acquisition.
Act of States.
Applicability.

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Scope.
Bengal Land Revenue Sales (W. B. Amendment) Act.
Imposition of Tax.
Locus standi.
Measure of Compensation.
Property.
Public purpose.
Schedule 7 and Art. 31.
Sub-section 3.
Sub-section (4).
Sub-section (5).

(372) *Art. 31—Acquisition—Meaning of.* Per *Mahajan J. (S. R. Das J. dissenting)*—The word 'acquisition' has quite a wide concept, meaning the procuring of property or the taking of it permanently or temporarily. It does not necessarily imply the acquisition of legal title by the State in the property taken possession of. *Dwarkadas Shrinivas* v. *The Sholapur Spinning & Weaving Co. Ltd., and others*

A I R 1954 S C 119 (129) =1954 S C R 674=1954 S C J 175.

(373) *Art. 31 (2) — Acquisitions — 'Acquired or taken possession of'.*

Per *Majority; (S. R. Das J. and Jaganadhadas J. contra)*—The words 'acquired or taken possession' used in Cl. (2) of Art. 31 cannot be construed in a narrow technical sense. It cannot be assumed that the ordinary word 'acquisition' was used in the Constitution in the same narrow sense in which it may have been used in pre-Constitution legislation relating to acquisition of land. These enactments related to land, whereas Art. 31 (2) refers to moveable property also, as to which no formal transfer or vesting of title is necessary. Nor is there any warrant for the assumption that 'taking possession of property' was intended to mean the same thing as 'requisitioning property' referred to in the Entries of the Seventh Schedule. The word 'acquisition' and its grammatical variations should, in the context of Art. 31 and the Entries of the 7th Schedule, be understood in their ordinary sense, and the additional words 'taking possession of' or 'requisition' are used in Art. 31 (2) and in the entries respectively, not in contradistinction with but in amplification of the term 'acquisition' so as to make it clear that the words taken together cover even those kinds of deprivation which do not involve the continued existence of the property after it is acquired.

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The expression 'taking possession' can only mean taking such possession as the property is susceptible of and not actual physical possession as 'the interest in, or in any company owning any commercial or industrial undertaking', which is expressly included in Cl. 2 of Art. 31, is not susceptible of any actual physical occupancy or seizure. The expression 'shall be taken possession of or acquired' in Cl. (2) does not admit of being construed in the same wide sense as the word 'taken' used in the Fifth Amendment of the American Constitution, but implies such as appropriation of the property or abridgement of the incidents of its ownership as would amount to a deprivation of the owner. Any other interference with enjoyment of private property short of such appropriation or abridgement would not be compensable under Art. 31 (2). Per S. R. Das J. The word 'acquired' used in Art. 31(2) must be given the special meaning which that word has acquired and cannot be read as synonymous with 'taken' as used in the Fifth Amendment to the Constitution of the United States. The expression 'taken possession of or acquired' occurring in Cl. (2) has not the same meaning which the word 'deprived' used in Cl. (1) has; 'taken possession of or acquired' should be read as indicative of the concept of 'requisition or acquisition' Per Jagannadhadas J. 'Taking possession' and 'acquisition' are not to be construed as having reference to and meaning 'Deprivation' or vice versa. Undoubtedly 'taking possession' and 'acquisition' amount to 'deprivation' but the converse may not follow in the particular context in which these words and phrases are used. While the framers of the Constitution laid down the requirement of the authority of law for 'deprivation of property' with a larger connotation they limited the requirement of payment of compensation to what may reasonably be comprehended within the concepts of 'acquisition' and taking possession'. To read these words and phrases in Art. 31 (2) as meaning the same thing as 'deprivation' used in Art. 31 (1) and to make the test of substantial abridgment' or deprivation as the 'sine qua non' for payment of compensation under Art. 31 (2) is to open the door for introduction of most, if not all the elements of wide uncertainty which have gathered round the word 'taken' used in the corresponding context in the American Constitution. *State of West Bengal* v. *Subodh Gopal Bose and others*

A I R 1954 S C 92 (99, 114, 117, 118)
=1954 S C R 587=1954 S C J 127.

(374) *Art. 31—'Acquisition' and 'possession' of property—Distinction—Test.*

'Acquisition' means and implies the acquiring of the entire title of the expropriated owner, whatever the nature or extent of that title might be. The entire bundle of rights which were vested in the original holder would pass on acquisition to the acquirer leaving nothing in the former. In taking possession on the other hand, the title to the property admittedly remains in the original holder, though he is excluded from possession or enjoyment of the property. Article 31 (2) of the Constitution itself makes a clear distinction between acquisition of property and taking possession of it for a public purpose though it places both of them on the same footing in the sense that a legislation authorising either of these acts must make provision for payment of compensation to the displaced or expropriated holder of the property. In the context in which the word acquisition appears in Art. 31 (2), it can only mean and refer to acquisition of the entire interest of the previous holder by transfer of title.

The test is as to whether the owner has been dispossessed substantially from the rights held by him or the loss is only with regard to some minor ingredients of the proprietary right. *Charunjit Lal* v. *Union of India.*

A I R 1951 S C 41
=1951 S C J 29
=1950 S C R 869.

(375) *Articles 31 and 19—Act of State.*

No State Government has a right to do anything in the nature of an act of State. *Virendra Singh and others* v. *State of Uttar Pradesh.*

A I R 1954 S C 447 (449)
=1954 S C J 705.

(376) *Arts. 31 (1), 32, 265—Applicability—Deprivation of property for recovery of Tax—Art. 31 (1) does not apply.*

As there is a special provision in Art. 265 of the Constitution that no tax shall be levied or collected except by authority of law, Cl. (1) of Art. 31 must therefore be regarded as concerned with deprivation of property otherwise than by the imposition or collection of tax and inasmuch as the right conferred by Art. 265 is not a right

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conferred by Part III of the Constitution it cannot be enforced under Art. 32, A. I. R. 1951 S C 97, *Rel. on.*

Where therefore the proceedings taken against the petitioners under the Act XXX of 1947 had concluded so far as the investigation commission was concerned more than two years before the petition under Art. 32 was presented in the Supreme Court and the property of the petitioners was sold by public auction for the recovery of income tax under the assessment orders made under the Income-tax Act itself. Held on facts of the case, that the petition was not maintainable and that even otherwise in the peculiar circumstances that had arisen, it would not be just and proper to direct the issue of any of the writs, the issue of which was discretionary with the Court. *Laxmanappa Hanumantappa Jamkhandi* v. *Union of India* **A I R 1955 S C 3.**

(377) *Art. 31 (1) & (2)—Scope—Deprivation, acquisition and taking possession.*

Per *Mahajan J.*—Article 31 is a self-contained provision delimiting the field of eminent domain and Art. 31 (1) and (2) deal with the same topic of compulsory acquisition of property. The words 'acquisition' and 'taking of possession' used in Art. 31 (2) have the same meaning as the word 'deprivation' in Art. 31 (1). Article 31 gives complete protection to private property as against executive action, no matter by what process a person is deprived of possession of it. In other words, the Constitution declares that no person shall be deprived of possession of private property without payment of compensation and that too under the authority of law, provided there was a public purpose behind that law. It is immaterial to the person who is deprived of property as to what use the State makes of his property or what title it acquires in it. The protection is against loss of property to the owner and there is no protection given to the State by the Article. It has no fundamental right as against the individual citizen. Article 31 states the limitations on the power of the State in the field of taking property and those limitations are in the interests of the person sought to be deprived of his property. The question whether acquisition has a larger concept than is conveyed by the expression 'taking possession' is really of academic interest in view of

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the comprehensive phraseology employed by Clause (2) of Art. 31. Per Bose J.: The possession and acquisition referred to in Cl. (2) mean the sort of 'possession' and 'acquisition' that amounts to 'deprivation' within the meaning of Cl. (1). No hard and fast rule can be laid down. Each case must depend on its own facts. But if there is substantial deprivation, then Cl. (2) is attracted. By substantial deprivation, I mean the sort of deprivation that substantially robs a man of those attributes of enjoyment which normally accompany rights to, or an interest in, property. The form is unessential. It is the substance that we must seek'. Per Gulam Hassan J: Article 31 (1) embodies a categorical declaration proclaiming the right of property and equally categorically prohibits the State from depriving the owner of the property by an executive act or without being backed by the authority of law. The intention underlying the Article being the protection of property against invasion by the State, both Parts (1) and (2) of Art. 31, should be read together so as to harmonize with that intention. I am not prepared to subscribe to the proposition that Art. 31 (1) stands by itself and should be read separately from (2) and I cannot attribute an intention to our Parliament to deprive a person of his property merely by passing an Act. The two parts of the Article form an integral whole and cannot be dissociated from each other. Whether the facts in a given case amount to deprivation of property within the meaning of Art. 31 will depend upon the circumstances of each case and it is not possible, in the nature of things, to lay down any inflexible test which may be universally applicable. When it can be shown that the statute substantially interfers with the right of enjoyment of property, it will be hit by Art. 31 (2) and declared void, unless compensation is provided. *Dwarkadas Shrinivas, Appellant* v. *The Sholapur Spinning & Weaving Co.*

A I R 1954 S C 119 (128, 138, 139)
=1954 S C R 674
=1954 S C J 175.

(378) *Art. 31 (1) and (2)—Scope.*

Clauses (1) and (2) of Article 31 are not mutually exclusive in scope but should be read together as dealing with the same subject, namely, the protection of the right to property by means of limitations on the State's powers, the deprivation contemplated

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in clause (1) being no other than acquisition or taking possession of the property referred to in clause (2). A. I. R. 1954 S. C. 92 and A. I. R. 1954 S. C. 119, Rel. on. *Saghir Ahmad* v. *State of U. P.*

A I R 1954 S C 728 (740).

(379) *Art. 31 (1) & (2)—Scope.*

The American doctrine of police power as a distinct and specific legislative power is not recognised in our Constitution and it is therefore contrary to the scheme of the Constitution to say that Cl. (1) of Art. 31 must be read in positive terms and understood as conferring police power on the Legislature in relation to rights of property. It is the legislature alone that can interpose and compel the individual to part with his property. It is this limitation which the framers of our Constitution have embodied in Cl. (1) of Art. 31 which is thus designed to protect the rights to property against deprivation by the State acting through its executive organ, the Government, Cl. (2) imposes two further limitations on the Legislature itself. It is prohibited from making a law authorising expropriation except for public purposes and on payment of compensation for the injury sustained by the owner. These important limitations on the power of the State, acting through the executive and legislative organs to take away private property are designed to protect the owner against arbitrary deprivation of the property, Clauses (1) and (2) of Art. 31 are thus not mutually exclusive in scope and content, but should be read together and understood as dealing with the same subject, namely the prosecution of the right to property by means of the limitations on the State power referred to above, the deprivation contemplated in Cl. (1) being no other than the acquisition or taking possession of property referred to in Cl. (2). *State of West Bengal* v. *Subodh Gopal Bose.*

A I R 1954 S C 92 (98, 99, 117) =1954 S C R 587=1954 S C J 127.

(380) *Arts. 31 (2) and (5)—Scope.*

The argument that the saving cl. (5) in Art. 31 has been inserted in the article by way of abundant caution cannot be accepted. The saving cl. (5) comprehensively includes within the ambit all the powers of the State in exercise of which it could deprive a person of property without payment of compensation. All forms of deprivation of property by the State without

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payment of compensation have been included within the ambit of the exception clause, while other forms of deprivation which are outside the ambit of the exception clause are inevitably within the mischief of Cl. 2 of the Article. The Constitution while defining and delimiting fundamental rights would not introduce in the articles dealing with those rights some matter merely by way of abundant caution. It was essential while delimiting and defining fundamental rights to fully define the field of the right and to say what was not included within that right. The article read as a whole, comprehensively defines the State's power of eminent domain as distinguished from all its other powers, the exercise of which may amount to the taking of private property. The argument that exceptions in cl. (5) were incorporated in Art. 31 by way of abundant caution further stands negatived by the contents of sub-cl. (5) (b) (ii) of the Article. *Dwarkadas Shrinivas* v. *The Sholapur Spinning and Weaving Co. Ltd.*,

A I R 1954 S C 119 (127) =1954 S C J 175=1954 S C R 674.

(381) *Art. 31 (2)—Scope—Requirement as to 'public purpose'.*

(Per *Mahajan and Chandrasekhara Aiyar JJ.*)— The existence of a 'public purposes' is an implied condition of the exercise of compulsory powers of acquisition by the State but the language of Art. 31 (2) does not expressly make it a condition precedent to acquisition. It assumes that compulsory acquisition can be for a 'public purpose' only, which is inherent in such acquisition.

(Per *Patanjali Sastri C. J. and Das J.*)— The existence of a public purpose as a prerequisite to the exercise of the power of compulsory acquisition is an essential and integral part of the "provisions" of cl. (2). *State of Bihar* v. *Kameshwar Singh*, A I R 1952 S C 252 =1952 S C J 354=1952 S C R 889.

(382) *Art. 31 — Bengal Land Revenue Sales (West Bengal Amendment) Act (7 of 1950), S. 7 — Validity.*

A comparison of the scope and effect of the old S. 37 of the Bengal Land Revenue Sales Act (1859) with S. 37 which is substituted in its place by S. 4 of the Amending Act (7 of 1950) and which S. 7 of the

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Amending Act shows to be clearly retrospective, discloses that, although the right of a purchaser to annul under-tenures and evict under-tenants is curtailed by the new S. 37 by enlarging the scope of the exceptions in the old section, it entitles the purchaser, as a countervailing advantage, to enhance the rent payable by the tenure-holders and tenants newly brought within the exception. The purchaser is left free in other respects to continue in enjoyment of the property as before. In other words, what the Amending Act seeks to do is to enlarge the scope of the protection provided by the exception in the old section as it was found to be inadequate, while conferring certain compensating benefits on the purchaser. This amendment is in line with the traditional tenancy legislation in this country affording relief to tenants whenever the tenancy laws were found, due to changing conditions, to operate harshly on the tenantry.

The abridgement sought to be effected retrospectively of the rights of a purchaser at a revenue sale is not so substantial as to amount to a deprivation of his property within the meaning of Art. 31 (1) and (2). No question accordingly arises as to the applicability of cl. (5) (b) (ii) of the Article to the case.

It does not appear that the Bill which eventually became the Act was reserved for the consideration of the President or received his assent. Therefore, the impunged law cannot claim the protection of Art. 31 (4) and what is more, if it is such a law as is referred to in cl. (2) of Art. 31 then by virtue of cl. (3) it cannot have any effect at all. *State of West Bengal* v. *Subodh Gopal Bose,* **A I R 1954 S C 92 =1954 S C J 127=1954 S C R 587.**

(383) *Arts. 31 (1), 32, 265 — Imposition of taxes.*

Clause (1) of Art. 31 must be regarded as concerned with deprivation of property otherwise than by the imposition or collection of tax, for otherwise Art. 265 becomes wholly redundant. The protection against imposition and collection of taxes save by authority of law directly comes from Art. 265 and is not secured by cl. (1) of Art. 31. Article 265 not being in Chap. 3 its protection is not a fundamental right which can be enforced by an application to

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the Supreme Court under Art. 32. *Ramjilal* v. *I. T. Officer,* **A I R 1951 S C 97 =1951 S C J 203=1951 S C R 127.**

(384) *Art. 31 — Locus standi — Who can challenge constitutionality of statute offending Art. 31.*

The plaintiff, who was the registered holder of a number of partly paid-up preference shares of the Sholapur Spinning and Weaving Company, filed a suit against company, its directors appointed by the Government and the Union of India in the Bombay High Court on behalf of himself and other preference share-holders praying for a declaration that the resolution of the directors appointed by the Government of Bombay under Ordinance 2 of 1950, making a call on them was illegal and *ultra vires*, as the law under which they were appointed was itself invalid. The plaintiff claimed relief in the form of a declaration regarding the invalidity of the Ordinance and prayed for injunction restraining the directors from giving effect to the resolution. Held that in the circumstances of the case, the plaintiff as a preference share-holder of the company was entitled to challenge the constitutionality of the Ordinance on the basis that it abridged the company's fundamental right under Art. 31 (2) of the Constitution. *Dwarkadas Shrinivas* v. *The Sholapur Spinning and Weaving Co.,*
A I R 1954 S C 119 (130, 131, 134, 135, 138, 139)=1954 S C J 175 =1954 S C R 674.

(385) *Art. 31 (2)—Measure of compensation — Scope for legislative discretion— Principle which determines compensation which denies increment in value — West Bengal Land Development and Planning Act (21 of 1948), S. 8 Proviso (b) — Validity.*

While it is true that the legislature is given the discretionary power of laying down the principles which should govern the determination of the amount to be given to the owner for the property appropriated, such principles must ensure that what is determined as payable must be compensation, that is a just equivalent of what the owner has been deprived of. Within the limits of this basic requirement of full indemnification of the expropriated owner, the Constitution allows free play to the legislative judgment as to what principles

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should guide the determination of the amount payable. Whether such principles take into account all the elements which make up the true value of the property appropriated and exclude matters which are to be neglected, is a justiciable issue to be adjudicated by the Court. Considering that the West Bengal Act (21 of 1948) is a permanent enactment and lands may be acquired under it many years after it came into force, the fixing of the market value on 31st December 1946 as the ceiling on compensation under the latter part of the proviso to S. 8 without reference to the value of the land at the time of the acquisition is arbitrary and cannot be regarded as due compliance in letter and spirit with the requirement of Art. 31 (2). For the fixing of an anterior date for the ascertainment of value may not, in certain circumstances, be a violation of the Constitutional requirement as, for instance, when the proposed scheme of acquisition becomes known before it is launched and prices rise sharply in anticipation of the benefits to be derived under it, but the fixing of an anterior date, which might have no relation to the value of the land when it is acquired may be, many years later, cannot but be regarded as arbitrary. Any principle for determining compensation which denies to the owner any increment in value cannot result in the ascertainment of the true equivalent of the land appropriated. *State of West Bengal* v. *Mrs. Bella Banerjee*

A I R 1954 S C 170 (172, 173) =1954 S C J 95=1954 S C R 558.

(386) *Art. 31 — Property — Right to use public highway for trade.*

The right to use a public highway for purposes of trade is not in the nature of an easement and as such cannot be reckoned as property in law. *Saghir Ahmad* v. *State of U. P.*

A I R 1954 S C 728 (733) =1954 S C J 819.

(387) *Art. 31— Property—Meaning of.*

Per *S. R. Das J.*— The Mills, machineries, stocks etc., of the respondent company are 'property' within the meaning of Arts. 19 & 31. A contract or agreement which a person may have with the company and which may be cancelled by the directors in exercise of powers under the Ordinance will undoubtedly be 'property' within the meaning of two Articles. The rights of the share-

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holders, e. g. the right of voting, the right to elect directors and the right to apply for the winding up of the company are no doubt valuable rights but it is doubtful if any of these rights can be called 'property' within the meaning of Art. 31 (2) for by itself and apart from the shares, none of them can be acquired or disposed. Per Bose J : Property includes 'any commercial or industrial undertaking'. It also includes any interest in 'any company owning' any interest in any commercial or industrial undertaking. Per Ghulam Hassan J: The word 'property' used in the Article must be construed in the widest sense as connoting a bundle of rights exercisable by the owner in respect thereof and embracing within its purview both corporeal and incorporeal rights. The word 'property' is not defined in the Constitution and there is no good reason to restrict its meaning. *Dwarkadas Shrinivas* v. *The Sholapur Spinning & Weaving Co.*,

A I R 1954 S C 119 (135, 136, 138, 139)=1954 S C R 674 =1954 S C J 175.

(388) *Art. 31 (2) — "Public purpose", what is —Tenancy Laws — U. P. Zamindari Abolition and Land Reforms Act, 1950 (1 of 1951)—Acquisition is for public purpose.*

(Per *Mahajan J.*): The expression "public purpose" is not capable of a precise definition and has not a rigid meaning. It can only be defined by a process of judicial inclusion and exclusion. In other words, the definition of the expression is elastic and takes its colour from the statute in which it occurs, the concept varying with the time and state of society and its needs. The point to be determined in each case is whether the acquisition is in the general interest of the community as distinguished from the private interest of an individual. Legislation (U. P. Act 1 of 1951) which aims at elevating the status of tenants by conferring upon them the bhumidari rights to which status the big zamindars have also been levelled down cannot be said as wanting in public purposes in a democratic State. It aims at destroying the inferiority complex in a large number of citizens of the State and giving them a status of equality with their former lords and prevents the accumulation of big tracts of land in the hands of a few individuals which is contrary to the expressed intention of the Constitu-

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tion. Zamindaries are not being taken for the private benefit of any particular individual or individuals but are being acquired by the State in the general interests of the community. Property acquired will be vested either in the State or in the body corporate, the gaon samaj which has to function under the supervision of the State. All that the Act achieves is the equality of the status of the different persons holding lands in the State. It is not correct to say that Government is acquiring the properties for the purpose of carrying on a business or trade. The moneys received from persons seeking bhumidari status or from the income of zamindari estates will be used for State purposes and for the benefit of the community at large. *State of Bihar* v. *Kameshwar Singh*

A I R 1952 S C 252
=1952 SC R 889=1952 S C J 354.

(389) *Art. 31 (2) — Public purpose— Acquisition of the proprietary rights apart from land.*

Per *Mahajan J.* — It is open to the Government to acquire the whole of the rights of an owner or a part of that right. Leasehold and other similar rights can always be acquired and if a person owns the totality of rights, it is not necessary to acquire the whole interest of that person if it is not needed for the public purposes— State can acquire proprietary rights in the land and leave bhumidari rights with landlord. *State of Bihar* v. *Kameshwar Singh* **A I R 1952 S C 252**
=1952 S C R 889=1952 S C J 354.

(390) *Art. 31 & Sch. 7, List 3 Entry 42 —Public purposes—Justiciability of.*

Under existence of a public purpose behind the acquisition of the items of property mentioned in any Zamindari Abolition Act is not a justiciable issue in case of an enactment which having fulfilled the requirements of Cl. (4) of Art. 31 of the Constitution enjoys the protection afforded by it. *Zamindar of Ettavapuram* v. *State of Madras* **A I R 1954 S C 257 (258)**
=1954 S C R 761=1954 S C J 282.

(391) *Art. 31 and Sch. 7, List 3, Entry 42—Principle of giving compensation for property acquired— This principle cannot be invoked in respect of Madras Estates (Abolition and Conversion into Ryotwari) Act, 26 of 1948).*

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List 3 of Sch. 7 Entry 42 is undoubtedly the description of a legislative head and in deciding the competency of a legislation under this entry, the court is not concerned with the justice or propriety of the principles upon which the determination of the compensation is to be made or the form or manner in which it is to be given. But even then the legislation must rest upon some principle of giving compensation and not of denying or withholding it, and a legislation cannot be supported which is based upon something which is non-existent or is unrelated to facts and consequently cannot have a conceivable bearing on any principle of compensation. This doctrine cannot be invoked in respect of the Madras Estates (Abolition and Conversion into Ryotwari) Act (26 of 1948) which is passed by the Madras Provincial Legislature functioning under the Government of India Act 1935. For there was no entry in any or the lists attached to that Act corresponding to Sch. 7 List 3 Entry 42 of the Constitution of India. The only entry relevant to this point in the Act of 1935 was Item 9 of List II which spoke merely of compulsory acquisition of land, and it is clear that a duty to pay compensation or of laying down any principle regarding it was not inherent in the language of that entry. *Zamindar of Ettavapuram* v. *State of Madras*

A I R 1954 S C 257 (259)
=1954 SC R 761=1954 S C J 282.

(392) *Art. 31 and Sch. VII, List 3, Entry 42 — Principle of giving compensation cannot be invoked in respect of Madras Act, 26 of 1948—(Madras Estates (Abolition and Conversion into Ryotwari) Act (26 of 1948), S. 24).*

It is not open to a holder of Zamindari estate in the State of Madras to raise the contention that the provisions relating to compensation as contained in the Madras Act 26 of 1948 are invalid on the ground that they are colourable exercise of legislative powers under the Government of India Act, 1935. The reason is that there is no entry in any of the legislative lists in the Government of India Act, 1935 corresponding to Entry 42 of List 3, Sch. VII in the present Constitution and the guarantee given by S. 299 (2) of the Act of 1935 is not available to the appellant by reason of Art. 31 (6) of the Constitution. This is so even with respect to the contention that

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absolutely no compensation has been allowed in respect of a large number of under-tenures. *AL. VR. ST. Veerappa Chettiar* v. *State of Madras*

A I R 1954 S C 605 (606).

(393) *Art. 31, Sch. 7, Entry 36, List III, Entry 42 — 'Public purpose'—Meaning of—Words and Phrases — Public purpose.*

Per *Das J.*—Whatever furthers the general interests of the community as opposed to the particular interest of the individual must be regarded as a public purpose.

The proper approach is to take the scheme as a whole and then examine whether the entire scheme of acquisition is for a public purpose. It is an entirely wrong approach to pick out an item out of a scheme and say that that item is not supported by a public purpose.

Per *Mahajan and Das JJ.*— The phrase 'Public purpose' has to be construed according to the spirit of the times in which particular legislation is enacted. *State of Bihar* v. *Kameshwar Singh*

A I R 1952 S C 252
=1952 S C R 889
=1952 S C J 354.

(394 to 399) *Arts. 31 (3) and 200—Law passed by State Legislature—Assent of both Governor and President—Necessity of.*

Article 200 does not contemplate the Governor giving his assent and thereafter, when the bill has become full-fledged law, reserving it for the consideration of the President. Indeed, the Governor is prohibited from giving his assent where such reservation by him is made compulsory. The Constitution would thus seem to contemplate only "bills" passed by the House or Houses of Legislature being reserved for the consideration of the President and not "laws" to which the Governor has already given his assent. Article 31 (3) must therefore be understood as having reference to what in historical sequence, having been passed by the House or Houses of the State Legislature and reserved by the Governor for the consideration of the President and assented to by the latter, has thus become a law. It is not intended that such a law should have the assent of both the Governor and the President. *State of Bihar* v. *Kameshwar Singh,* **A I R 1952 S C 252 =1952 S C R 889=1952 S C J 354.**

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(400) *Art. 31 (4)—Scope.*

It is the law to which the assent of the President is given that is protected from any attack on the ground of non-compliance with the provisions of Cl. (2) of Art. 31. There is no warrant for assumption that the bill has got to be passed in its original shape without any change whatsoever, before the provision of Cl. (4) of Art. 31 could be attracted. The expression "passed by such legislature" must mean "passed with or without amendments," in accordance with the normal procedure contemplated by Art. 107 of the Constitution. *K. C. G. Narain Deo* v. *State of Orissa,*

A I R 1953 S C 375.

(401) *Arts. 31 (4) and 31-A — Scope of Art. 31 (4) compared with scope of Art 31-A.*

(Per *Patanjali Sastri C. J.*):—The scope of Art. 31 (4) is at once narrower and wider than that of Art. 31-A; the former has application only to statutes which were pending in the legislature at the commencement of the Constitution, whereas the latter is subject to no such restriction. Again Art. 31 (4) excludes attack only on the ground of contravention of Art. 31 (2), while Art. 31A bars objections based on contravention of other provisions of Part III as well, such as Arts. 14 and 19. This indeed was the reason for the enactment of Arts. 31A and 31B, as the words of exclusion in Art. 31 (4) were found inapt to cover objections based on contravention of Art. 14. On the other hand, the law referred to in Art. 31 (4) covers acquisition of any kind of property, while Art. 31-A relates only to the acquisition of a particular kind of property, viz., estates and rights therein, and, what is more important, the 'non obstante' clause in Art. 31 (4) overrides all other provisions in the Constitution including the Lists of the Seventh Schedule, whereas a law which falls within the purview of Art. 31-A could only prevail over "the foregoing provisions of this Part." *State of Bihar* v. *Kameshwar Singh,*

A I R 1952 S C 252 =1952 S C R 889=1952 S C J 354.

(402) *Arts. 31 (4) and 200 — Duties entrusted to President by Articles — Performance of at one and same time.*

(Per *Mahajan J.*) : — It cannot be said that the President cannot perform both the duties entrusted to him by Arts. 200, 31

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(3) and (4) at one and the same time. He is not disabled under the Constitution from applying his mind to a bill once and for all and to see whether it fulfils the requirements of Art. 31 (2). *State of Bihar* v. *Kameshwar Singh*,

A I R 1952 S C 252 =1952 S C R 889=1952 S C J 354.

(403) Article 31 (4) — Bill introduced— Assembly prorogued on 21st January 1950 —Bill is still pending and does not lapse— Coming in of Constitution meanwhile on 26th January 1950—Bill held was pending when Constitution came into force — Reintroduction of Bill afterwards does not mean introduction of new bill—Art. 31 (4) applies: Per *Mahajan J.* — (Constitution of India, Art. 196)—(Tenancy Laws—U. P. Zamindari Abolition and Land Reforms Act, 1950 (I of 1951)). *State of Bihar* v. *Kameshwar Singh*, A I R 1952 S C 252 =1952 S C R 889=1952 S C J 354.

(404) *Art. 31 (5) and (6) — Scope and object — West Bengal Land Development and Planning Act (21 of 1948), S. 8.*

Article 31 (6) is intended to save a State law enacted within 18 months before the commencement of the Constitution provided the same was certified by the President, while Art. 31 (5) saves all existing laws passed more than 18 months before the commencement of the Constitution. Reading the two clauses together, the intention is clear that an existing law passed within 18 months before 26th January 1950 is not to be saved unless it was submitted to the President within three months from such date for his certification and was certified by him. The provision in S. 8 of the West Bengal Land Development and Planning Act, relating to the conclusiveness of the declaration of Government as to the nature of the purpose of the acquisition held is unconstitutional and is not saved by Art. 31 (5) of the Constitution. *State of West Bengal* v. *Mrs. Bella Banerjee*,

A I R 1954 S C 170 (172) =1954 S C R 558=1954 S C J 95.

(405) *Art. 31-A—Modification—Meaning of.*

The word "modification" in the context of the Article only means a modification of the proprietary right of a citizen like an extinguishment of that right and cannot include within its ambit a mere suspension of the right of management of estate for a

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time definite or indefinite. *Raghubir Singh* v. *Court of Wards, Ajmer*,

A I R 1953 S C 373=1954 S C R 1049 =1953 S C J 505.

(406) *Arts. 31-A and 31B — Applicability of, to M. P. Abolition of Proprietary Rights Act — Tenancy Laws — (M. P. Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act (I (1) of 1951), S. 1).*

There is nothing in Art. 31-B to indicate that the specific mention of certain statutes was only intended to illustrate the application of the general words of Art. 31-A. The opening words of Art. 31-B are only intended to make clear that Art. 31-A should not be restricted in its application by reason of anything contained in Art. 31-B and are in no way calculated to restrict the application of the latter article or of the enactments referred to therein to acquisition of 'estate'. Therefore, though *malguzari* lands could not be regarded as estates within the meaning of Art. 31-A read with the Tenancy Acts in force in Madhya Pradesh, inasmuch as Art. 31-B, purported to validate specifically the Madhya Pradesh Act among others and as that article was not limited in its application to estates, it cannot be said that in regard to the *malguzari* lands covered by the Madhya Pradesh Act, Arts. 31-A and 31-B, could be of no assistance to the Government. *State of Bihar* v. *Kameshwar Singh*,

A I R 1952 S C 252=1952 S C R 889 =1952 S C J 354.

(407) *Art. 31-A — Part III does not stand repealed qua the estates of Zamindars and is not 'non-est'.*

(Mahajan and Das JJ.)—Qua the estate of the Zamindars, Part III of the Constitution does not stand repealed and is not 'non est' by Constitution (First Amendment) Act, 1951. The truth is that Part III of the Constitution is an important and integral part of it and has not been repealed or abrogated by anything contained in Article 31-A of the Constitution. On the other hand Art. 31-A while providing that no law providing for the acquisition by the State of any estate, shall be deemed to be void on the ground that it is inconsistent with or takes away or abridges any of the rights conferred by any of the provisions of part III clearly provides that where such law is made by the legislature of a State,

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the provisions of this article shall not apply thereto unless such law having been reserved for the consideration of the President has received his assent. This provision in express terms keeps alive the alternative provisions of Part III of the Constitution in Art. 31 (3) for judging whether the State law has or has not complied with the provisions of Article 31 (2). The provisions of Art. 31 (2), therefore, do not stand repealed by Art. 31-A. On the other hand, they are kept alive. The difference is that persons whose properties fall within the definition of the expression 'estate" in Art. 31-A are deprived of their remedy under Art. 32 of the Constitution and the President has been constituted the sole judge of deciding whether a State law acquiring estates under compulsory powers has or has not complied with the provisions of Art. 31 (2). The validity of the law in those cases depends on the subjective opinion of the President and is not justiciable. Once the assent is given the law is taken to have complied with the provisions of Art. 31 (2). *State of Bihar* v. *Kameshwar Singh*,

A I R 1952 S C 252=1952 S C R 889 =1952 S C J 354.

(408) *Arts. 31A, 31B—Validity of.*

Articles 31A and 31B inserted in the Constitution do not either in terms or in effect seek to make any change in Art. 226 or in Arts. 132 and 136. Article 31A aims at saving laws providing for the compulsory acquisition by the State of a certain kind of property from the operation of Art. 13 read with other relevant articles in Part III, while Art. 31B purports to validate certain specified Acts and Regulations already passed, which, but for such a provision, would be liable to be impugned under Art. 13. The new articles being essentially amendment of the Constitution, Parliament alone had the power of enacting them. That the laws thus saved relate to matters covered by List II does not in any way affect the position. To make a law which contravenes the Constitution constitutionally valid is a matter of constitutional amendment, and as such it falls within the exclusive power of Parliament. *Shankari Prasad* v. *Union of India*, **A I R 1951 S C 458 =1951 S C J 775=1952 S C R 89.**

(408A) Article 32

See also **(i) A I R 1950 S C 163 under Art. 13 (No. 203).**

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(ii) A I R 1953 S C 250 under Arts. 311, 14, 16 (1).

(iii) A I R 1954 S C 400 under Hindu Law.

(iv) Articles 226 & 311.

(409) *Art. 32 — Article has no application to voluntary actions.*

Article 32 of the Constitution is not intended for relief against the voluntary actions of a person. During the pendency of the investigation under the Taxation on Income (Investigation Commission) Act, 1947, the petitioner applied for settlement under the provisions of S. 8A. In the settlement application the applicant proposed that he was prepared to pay the sum of Rs. 18,44,949/- which was the sum payable by him according to the investigation of commissioner. The Central Government accepted this proposal and the claim for evaded income-tax was thus finally settled by mutual agreement. Part of this amount was paid in instalments as agreed. When a part remained unpaid, the petitioner preferred a petition under the provisions of Art. 32 of the Constitution alleging that he had been advised that the entire proceedings under the Act which had resulted in the imposition upon him of a liability of Rs. 18,44,949/- and in the payment already made were wholly illegal and *ultra vires*. In the grounds of the petition it was stated that Ss. 5, 6, 7 & 8 of Act XXX of 1947 were invalid and *ultra vires* in so far as they contravene the provisions of Arts. 14, 19 (1) (f) and 31 of the Constitution. The petition was based on the ruling of the Supreme Court in A I R 1954 S C 545 which was in the meanwhile given. Held that the petition was misconceived. Whatever tax the petitioner had already paid, or whatever was still recoverable from him, was being recovered on the basis of the settlement proposed by him and accepted by the Central Government. Because of his request for a settlement no assessment was made against him by following the whole of the procedure of the Income-tax Act. In this situation unless and until the petitioner could establish that his consent was improperly procured and that he was not bound thereby he could not complain that any of his fundamental rights had been contravened for which he could claim relief under Art. 32

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of the Constitution. *Gopal Das Mohta* v. *Union of India*,

A I R 1955 S C 1.

(410) *Art. 32—Scope of inquiry.*

The case of the petitioner was referred to the Commission under the provisions of S. 5 (4), Taxation on Income (Investigation Commission) Act and was not referred to the Commission of the Central Government under the provisions of S. 5 (1):

Held that that being so, an enquiry into the validity of S. 5 (1) was really outside the scope of the present case. *Suraj Mall Mohta & Co.* v. *A. V. Visvanatha Sastri*,

A I R 1954 S C 545 (551) =1954 S C J 611.

(411) *Art. 32—Habeas corpus — Detention under Preventive Detention Act — Validity—Public Safety—Preventive Detention Act, 1950, S. 3 (1).*

When the detenus were alleged to have published and distributed pamphlets which were couched in the most filthy and abusive language and amounted to a vitriolic attack upon the character and integrity of the present Chief Justice of Pepsu who was accused *inter alia* of gross partiality and communal bias in the matter of recruting officers for judicial posts and also in deciding cases between the litigants. Held, that the orders of detention should be held to be illegal and must be set aside as the publication or distribution of these pamphlets could not have any rational connection with the maintenance of law and order in the state or prevention of acts leading to disorder or disturbance of public tranquillity. Whatever other remedies that might be open to the aggrieved party or to the Government to prevent such scurrilous attack upon the head of the Judiciary in the State, the provisions of the Preventive Detention Act could not be made use of for that purpose. The utmost that could be said was that the allegations in the pamphlets were calculated to undermine the confidence of the people in the proper administration of justice in the State. But it was too remote a thing to say, therefore, that the security of the State or the maintenance of law and order in it would be endangered thereby. *Sodhi Shamshersingh* v. *State of Pepsu*,

A I R 1954 S C 276 (277).

(412) Art. 32 — Habeas Corpus petition —Rejection on merits—Reconsideration on

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constitutional points — Case cannot be reopened for reason that grounds of detention are vague. A I R 1952 S C 324, *Considered. Godavari* v. *State of Bombay*,

A I R 1953 S C 52 =1953 S C R 210=1953 S C J 28.

(413) *Art. 32—Returns.*

In a question of habeas corpus, when the lawfulness or otherwise of the custody of the persons concerned is in question, the documents containing order of remand would be of vital importance and should be produced at time of filing return. *Ram Narayan Singh* v. *The State of Delhi*,

A I R 1953 S C 277.

(414) *Art. 32 — Crucial date of detention.*

In habeas corpus proceedings, the Court is to have regard to the legality or otherwise of the detention at the time of the return and not with reference to the institution of the proceedings. *Ram Narayan Singh* v. *The State of Delhi*,

A I R 1953 S C 277.

(415) *Art. 32 — Detention without remand — (Criminal P. C. (1898), Ss. 167 and 344).*

Detention of a person in custody after the expiry of remand order without any fresh order of remand committing him to further custody while adjourning the case under S. 344, Criminal P. C., is illegal. *Ram Narayan Singh* v. *The State of Delhi*, **A I R 1953 S C 277.**

(416) *Art. 32—Scope of remedy under.*

The scope of the remedy under Art. 32 is restricted solely to enforcement of fundamental rights conferred by Part III of the Constitution. Any right which the petitioners may have as rate payers in the municipality to insist that the Municipal Board should be legally constituted and that respondents, who are not properly elected or nominated members, should not be permitted to take part in the proceedings of the Board, is outside the purview of Art. 32, as such right, even if it exists is not a fundamental right conferred by Part III. *Nain Sukh Das* v. *U. P. State*,

A I R 1953 S C 384 =1953 S C J 546.

(417) *Art. 32—Scope and object—Question of legislative competency — When can be raised.*

Article 32 is not directly concerned with the determination of constitutional validity

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of particular legislative enactments. What it aims at, is the enforcing of fundamental rights guaranteed by the Constitution, no matter whether the necessity for such enforcement arises out of an action of the executive or of the legislature. To make out a case under this Article, it is incumbent upon the petitioner to establish not merely that the law complained of is beyond the competence of the particular Legislature as not being covered by any of the items in the legislative lists, but that it affects or invades his fundamental rights guaranteed by the Constitution, of which he could seek enforcement by an appropriate writ or order. The rights that could be enforced under Art. 32 must ordinarily be the rights of the petitioner himself who complains of infraction of such rights and approaches the Court for relief.

A proceeding under this article cannot really have any affinity to what is known as a declaratory suit. A prayer for prayer in the shape of a declaration is inappropriate to an application under Art. 32. *Charanjit Lal* v. *Union of India*,

A I R 1951 S C 41
=1951 S C J 29
=1950 S C R 869.

(418) *Art. 32 — Proper writ not asked for—Effect.*

Article 32 gives the Courts very wide discretion in the matter of framing their writs to suit the exigencies of particular cases, and an application cannot be thrown out simply on the ground that the proper writ or direction has not been prayed for. *Charanjit Lal* v. *Union of India*,

A I R 1951 S C 41
=1951 S C J 29
=1950 S C R 869.

(419) *Art. 32 — Petition to Supreme Court.*

The wording of Art. 32 shows that the Supreme Court can be moved to grant a suitable relief, mentioned in Art. 32 (2), only in respect of the fundamental rights mentioned in Part III of the Constitution. *Gopalan* v. *State of Madras*,

A I R 1950 S C 27
=1950 S C J 174
=1950 S C R 88.

(419-A) *Art. 32—Scove and extent of—Jurisdiction of Supreme Court under Art. 32 whether concurrent with that of*

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High Court under Art. 226 — Constitution of India, 226.

Article 32 does not merely confer power on the Supreme Court, as Art. 226 does on the High Courts, to issue certain writs for the enforcement of the rights conferred by Part III or for any other purpose, as part of its general jurisdiction Art. 32 provides a "guaranteed" remedy for the enforcement of those rights, and this remedial right is itself made a fundamental right by being included in Part III. The Supreme Court is thus constituted the protector and guarantor of fundamental rights, and it cannot, consistently with the responsibility so laid upon it, refuse to entertain applications seeking protection against infringements of such rights. The jurisdiction thus conferred on the Supreme Court by Art. 32 is not concurrent with the one given to High Courts by Art. 226. *Romesh Thapar* v. *State of Madras*, **A I R 1950 S C 124 =1950 S C J 418 = 1950 S C R 594.**

(420) *Art. 32 (2) — Scope.*

The power given to the Supreme Court under this provision is a large one, but it has to be exercised in accordance with well-established principles. The writs under the article must obviously be correlated to one or more of the fundamental rights conferred by Part III of the Constitution and can be made only for the enforcement of such rights. *Janardhan Reddy* v. *State of Hyderabad*, **A I R 1951 S C 217 = 1951 S C J 320 = 1951 S C R 344.**

(421) *Art. 32 (2)—Conviction and sentence etc. — Confirmation by Appellate Court — Finality of appellate order — Want of jurisdiction of trial Court—Writ of* habeas corpus*—Criminal P. C. (1898), S. 430.*

If it should appear on the face of the return that a person is in detention in execution of a sentence on indictment on a criminal charge, that would be a sufficient answer to an application for a writ of *habeas corpus*. Assuming, however, that it is open even in such cases to investigate the question of jurisdiction, where the conviction and sentence had been upheld on appeal by a Court of competent jurisdiction, the mere fact that the trial Court had acted without jurisdiction would not justify interference, treating the appellate order also as a nullity. Evidently, the appellate Court in a case

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which properly comes before it on appeal, is fully competent to decide whether the trial was with or without jurisdiction, and it has jurisdiction to decide the matter rightly as well as wrongly. If it affirms the conviction and thereby decides wrongly that the trial Court had the jurisdiction to try and convict, it cannot be said to have acted without jurisdiction, and its order cannot be treated as a nullity.

It is well settled that if a Court acts without jurisdiction its decision can be challenged in the same way as it would have been challenged if it had acted with jurisdiction, i.e., an appeal would lie to the Court to which it would lie if its order was with jurisdiction. *Janardhan Reddy* v. *State of Hyderabad*,

A I R 1951 S C 217 = 1951 S C J 320 = 1951 S C R 344.

(422) *Art. 32 (2)—Retrospective operation.*

The provisions of the Article were not intended to operate retrospectively, and therefore, something which was legally good on 25-1-1950, cannot be held to have become bad on 26-1-1950. Where, therefore, the judgment of High Court affirming the convictions and sentences of the petitioners had acquired finality in the fullest sense of the term before 26-1-1950, no one could question the validity of the convictions at the date when the Constitution came into force. *Janardhan Reddy* v. *State of Hyderabad*,

A I R 1951 S C 217 = 1951 S C J 320 = 1951 S C R 344.

(423) *Arts. 32, 226—Direct application to Supreme Court without appeal from decision under Art. 226 — Effect.*

Where the questions dealt with under the petition under Art. 32 had been raised before the High Court at previous stages by means of applications under Art. 226 and decided against but no appeal to the Supreme Court had been taken against the orders therein : *Held*, that nothing that the Supreme Court said was intended to be a pronouncement as to the correctness or otherwise of those orders, nor to encourage the practice of direct approach to the Supreme Court (except for good reasons) in matters which had been taken to the High Court and found against, without obtaining leave to appeal therefrom. *M. K. Gopalan* v. *The State of Madhya Pradesh*,

A I R 1954 S C 362 (364).

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(424) *Arts. 32 and 226—Breach of rules framed under Act — Remedy open to person aggrieved thereby.*

Where there has been any breach of the rules framed under an Act by the officers concerned the remedy for such breaches is as provided for in the Act itself. Mere irregularities committed in conducting an auction-sale held under the provisions of the Act cannot be said to have abridged the petitioner's fundamental rights and so Art. 32 is not attracted. It is open to the petitioner under Art. 226 to approach the High Court for a 'mandamus' if the officers concerned have conducted themselves not in accordance with law or if they have acted in excess of their jurisdiction. *Cooverjee B. Bharucha* v. *Excise Commissioner and Chief Commissioner, Ajmer* **A I R 1954 S C 220 = 1954 S C J 246 = 1954 S C R 873.**

(425) *Arts. 32 and 226* — Whether an application under Art. 32 is maintainable after a similar application under Art. 226 is dismissed by the High Court *(Quære)*. *Janardhan Reddy* v. *State of Hyderabad*,

A I R 1951 S C 217=1951 S C J 320 =1951 S C R 344.

(426) *Arts. 32 and 226—Scope.*

(Quære.) — Whether a proceeding under Art. 32 would lie after an application under Art. 226 for the same relief on the same facts had been rejected after due enquiry by a High Court. *Aswani Kumar* v. *Arabinda Bose*, **A I R 1952 S C 369 =1953 S C R 1=1952 S C J 568.**

(426-A) *Arts. 46, 912 and 13* — Executive Order Fixing Number of Seat for students of Particular Communities in Colleges — Invalid. *State of Madras* v. *Srimathi Champakam Dorairajan*,

A I R 1951 S C 226 =1951 S C R 525.

(Ed. *See also* under Article 29 (2) *(Supra)*).

(427) *Arts. 71 (1) and 329 (b)—Difference in drafting.*

There is an important difference between Art. 71 (1) and Art. 329 (b). Article 71 (1) had to be in an affirmative form, because it confers special jurisdiction on the Supreme Court which that Court could not have exercised but for this article. Article 329 (b), on the other hand, was primarily intended to exclude or oust the jurisdiction of all Courts in regard to electoral matters and

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to lay down the only mode in which an election could be challenged. The negative form was, therefore, more appropriate and, that being so, it is not surprising that it was decided to follow the pre-existing pattern in which also the negative language had been adopted. *N. P. Punuswami* v. *Returning Officer, Namakkal,*

A I R 1952 S C 64=1952 S C R 218 =1952 S C J 100.

(423) *Arts. 129 and 215—Contempt of Court — Interference with course of administration—Punishment.*

In order to constitute contempt, it is not necessary that there should in fact be an actual interference with the course of administration of justice but it is enough if the offending publication is likely or if it tends in any way to interfere with the proper administration of law. The summary of jurisdiction exercised by superior Courts in punishing contempt of their authority exists for the purpose of preventing interference with the course of justice and for maintaining the authority of law as is administered in the Court and thereby affording protection to public interest in the purity of the administration of justice. This is certainly an extraordinary power which must be sparingly exercised but where the public interest demands it, the Court will not shrink from exercising it and imposing punishment even by way of imprisonment, in cases where a mere fine may not be adequate.

The State of Uttar Pradesh having made a declaration under S 3 of the U. P. State Road Transport Act, 1950, the appellant who carried on business as carrier of passengers and goods by motor buses or lorries under a license issued by the State Government applied to the Allahabad High Court for a writ of mandamus directing the State Government and its Minister of Transport to withdraw the declaration. The application having been dismissed, the appellant filed an appeal to the Supreme Court. Many other persons who held similar licenses made applications to the Supreme Court under Art. 32 for appropriate writs. The appellant was also a petitioner in one of the writ applications. The appeal and the writ applications were posted on the cause list for the 14th September 1954. The appeal was part heard on that day and its hearing continued on the 16th and the 17th September. A large number of persons interested in the fate of the appeal attended the Court on all those dates. On the 15th September a leaflet printed in Hindi and purporting to be written by the appellant was distributed in the Court premises and it contained the following paragraph :

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"The public has full and firm faith in the Supreme Court but sources that are in the know say that the Government acts with partiality in the matter of appointment of those Hon'ble Judges as Ambassadors, Governors, High Commissioners, etc., who give judgments against Government but this has so far not made any difference in the firmness and justice of the Hon'ble Judges" :

Held (1) that the object of writing this paragraph and particularly of publishing it at the time it was actually done was quite clearly to affect the minds of the Judges and to deflect them from the strict performance of their duties. The offending passage and the time and place of its publication certainly tended to hinder or obstruct the due administration of justice and was a contempt of Court ;

(2) that even if the passage about the Judges were not in the leaflet the rest would still amount to a serious contempt of Court. There was in it a strong denunciation of the State of Uttar Pradesh, a party to the appeal and the petitions, regarding the very matters then under the consideration of the Court. It was not fair comment on the proceedings but an attempt to prejudice the Court against the State and to stir up public feeling on the very question then pending for decision. The manner in which the leaflets were distributed, the language used in them and the timing of their publication could only have had one object, namely, to try and influence the Judges in favour of the petitioner and the others who were in the same position as himself. This again was a clear contempt of the Court ;

(3) that in all the circumstances of this case it was a fit case where the power of the Court should be exercised and that it was necessary to impose the punishment of imprisonment. *Hiralal Dixit* v. *State of Uttar Pradesh,*

A I R 1954 S C 743 (745, 746, 747) =1954 S C J 846.

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(429) *Art. 129 — Contempt of Supreme Court — (Contempt of Courts Act (1926), S. 1).*

Where a newspaper article while criticising a Supreme Court decision not merely preached the Courts of law the sermon of divine detachment from extraneous considerations such as politics and policies but also proceeded to attribute improper motives to the Judges, it was held that the article not only transgressed the limits of fair and bona fide criticism but had a clear tendency to affect the dignity and prestige of the Court and therefore amounted to gross contempt of Court.

If an impression is created in the minds of the public that the Judges in the highest Court in the land act on extraneous considerations in deciding cases, the confidence of the whole community in the administration of justice is bound to be undermined and no greater mischief than that can possibly be imagined. *Aswini Kumar Ghose* v. *Arabinda Bose,* **A I R 1953 S C 75.**

(430) *Art. 132 (1) (3) — Grounds of appeal.*

Where the appeals have come up before Supreme Conrt on the strength of a certificate granted under Art. 132 (1), the appellants are not entitled to challenge the propriety of the decision appealed against on a ground other than that on which the certificate was given except with the leave of the Supreme Court. *Darshan Singh* v. *State of Punjab* **A I R 1953 S C 83 =1953 S C R 319.**

(431) *Art. 132 (1) — Appeal against judgment of single Judge of High Court.*

Civil proceeding — Judgment of single Judge of High Court — Certificate granted under Art. 132 (1) — Appeal to Supreme Court is competent and Art. 133 (3) is no bar. *Election Commission* v. *Saka Venkata Rao* **A I R 1953 S C 210 =1953 S C R 1144 =1953 S C J 293.**

(431-A) **Art. 133.**

See also (i) A I R 1953 S C 521 under Civil P. C., S. 110 (No. 138).
(ii) A I R 1954 S C 271 under Art. 136 (No. 461).

(432) *Art. 133—Retrospective effect.*

Plaintiff preferred a second appeal to the High Court of Jaipur. The appeal was allowed. The defendant applied for a review of this judgment. Meanwhile the Jaipur High

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Court had become defunct and the review was heard by the Rajasthan High Court as successor to the Jaipur High Court under the High Courts Ordinance and was partially allowed on the 5th of April 1950 and the decree was accordingly amended. It was against this judgment and decree passed after the coming into force of the Constitution of India that the present appeal had been preferred to the Supreme Court by leave of the Rajasthan High Court under Art. 133 (1) of the Constitution.

Held that the only operative decree in the suit which finally and conclusively determined the rights of the parties was the decree passed on the 5th of April 1950 by the Rajasthan High Court and that having been passed after the coming into force of the Constitution of India the provisions of Art. 133 were attracted to it and it was appealable to Supreme Court provided the requirements of that Article were fulfilled. The Code of Civil Procedure of the Jaipur State could not determine the jurisdiction of Supreme Court and had no relevancy to the maintainability of the appeal. *Nathoo Lal* v. *Durga Prasad* **A I R 1954 S C 355 (357) =1954 S C J 557.**

(433) *Arts. 133, 136—Substantial question of law—Civil Procedure Code, S. 110.*

Held that a substantial question of law was involved in the case, that is, whether a testamentary disposition by a Hindu in favour of a female heir conferred on her only a limited estate in the absence of evidence that he intended to confer on her an absolute interest in the property. In the circumstances the High Court was fully justified in granting the certificate. The Supreme Court itself would have been prepared to admit this appeal under its extraordinary powers conferred by Art. 136 (1) of the Constitution, if such a certificate had not been given in the case. *Nathoo Lal* v. *Durga Prasad* **A I R 1954 S C 355 (357) =1954 S C J 557.**

(434) *Arts. 133 (1) (c) and 134 (1) (c) —Certificate of fitness for appeal—Exercise of discretion.*

The Supreme Court has general powers of judicial superintendence over all Courts in India and is the ultimate interpreter and guardian of the Constitution. It has a duty to see that its provisions are faithfully obser-

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ved and, where necessary, to expound them. In the case of clause (c) both of Art. 133 (1) and Art. 134 (1), the only condition is the discretion of the High Court but the discretion is a judicial one and must be judicially exercised along the well-established lines which govern these matters. If it is properly exercised on well-established and proper lines, then there would be no interference except on very strong grounds. But if, on the face of the order, it is apparent that the court has misdirected itself and considered that its discretion was fettered when it was not, or that it had none, then the superior Court must either remit the case or exercise the discretion itself. *Nar Singh* v. *State of Uttar Pradesh*

A I R 1954 S C 457 (458)
=1954 S C J 570.

(435) *Art. 133— Concurrent finding of facts — C. P. C., S. 100.*

Concurrent finding of fact that alienation by Hindu widow was not a prudent act of management cannot be interfered with by the Supreme Court when the view taken by the lower Courts on evidence was proper. *Kalishanker Das* v. *Dhirendra Nath*

A I R 1954 S C 505 (508)
=1954 S C J 670.

(436) *Art. 134—Delay in disposal of leave application condemned.*

It is of the essence that an application for leave to appeal to the Supreme Court against the sentence of death awarded to the appellant by the High Court should be dealt with great despatch and the accused should know his fate and not be left with the feeling of apprehension for longer time than necessary. Whatever the state of arrears in a particular High Court, there is absolutely no justification for an inordinate delay of one year and ten months in the disposal of such an application. *Bissu Mahgoo* v. *State of Uttar Pradesh.*

A I R 1954 S C 714 (715).

(437) *Art. 134 (1) (c) — "Case"—Meaning.*

"Case" as used in Art. 134 (1) (c) means the case of each individual accused. That would be so even if the trial had been by the High Court itself but it is even more so on appeal because, though several persons may join on presenting a common memorandum of appeal (If the Rules of the Court so permit), the appeal of each forms a separate "case" for those purposes. That is

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obvious from the fact that every person who is convicted need not appeal nor need several convicts appeal at the same time under a joint memorandum: and if it were necessary to send up the "case" as a whole it would be necessary to join even those who were acquired so that the "case" could be reviewed in its entirety. That is not the meaning of the word in the context of Article 134 (1). *Nar Singh* v. *State of Uttar Pradesh.*

A I R 1954 S C 457 (458)
=1954 S C J 570..

(438) *Art. 134—Practice — Concurrent findings—(Evidence Act, S. 11)—(Cr. P. C., S. 411-A).*

The plea of alibi involves a question of fact and when both the Courts below concurrently found that fact against the accused, the Supreme Court cannot, on an appeal by special leave, go behind that concurrent finding of fact. *Thakur Prasad.* v. *The State of Madhya Pradesh.*

A I R 1954 S C 30 (31).

(439) *Arts. 134 and 136 — Acquittal by High Court—There is no appeal by such acquittal—Overriding power of Supreme Court under Art. 136— Cr. P. C., S. 417).*

Article 134 does not provide for an appeal from a judgment, final order or sentence in a criminal proceeding of a High Court, if the High Court has on appeal reversed an order of conviction of an accused person and has ordered his acquittal. In other words, there is no provision in the Constitution corresponding to S. 417, Criminal P. C., and such an order is final, subject, however to the overriding powers vested in the Supreme Court by Art. 136 of the Constitution. *The State Government, Madhya Pradesh* v. *Ramkrishna Ganpatrao Limsey.*

A I R 1954 S C 20 (22).

(440) *Art. 134 — Appreciation of evidence—Interference.*

Some eye-witnesses implicating both accused—Eye-witnesses believed—One of accused admitting his guilt and convicted—Supreme Court refusing to interfere in his case— In such case ordinarily Supreme Court would not interfere with the case of the other accused also, unless there are special reasons for not accepting the statements of these witnesses at their face value against the other accused. (Special circumstances, held existed). *Hate Singh* v. *State of M. B.*

A I R 1953 S C 468.

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(441) *Art. 134 — Appreciation of evidence—Interference.*

Usually the Supreme Court in a criminal appeal before it will not depart from its practice of declining to re-assess the evidence but where there has been a departure from the rule that when an accused person puts forward a reasonable defence which is likely to be true, and in addition is supported by two prosecution witnesses, then the burden on the other side becomes all the heavier because a reasonable and probable story likely to be true when pitted against a week and vacillating case is bound to raise reasonable doubts of which the accused must get the benefit, the Supreme Court would examine the evidence at length. (After reviewing the evidence the Supreme Court set aside the conviction and the sentence). *Hate Singh* v. *State of M. B.*

A I R 1953 S C 468.

(442) *Art. 134—Supreme Court Practice — Criminal Appeal — Interference in*

In the case of the concurrent findings of fact by both the lower courts, the Supreme Court cannot substitute its own appreciation of the evidence for those of the Courts below. The Supreme Court has, in the absence of any compelling reason, always declined to act as a third court of facts.

Held that in this case there was no reason for departing from that well recognised rule of practice adopted by the Court. *Damodaran* v. *State of Travancore-Cochin,*

A I R 1953 S C 462.

(443) *Arts. 134, 136 — Criminal appeal when to be entertained — Criminal P. C. (1898), S. 404.*

The Supreme Court will not entertain a Criminal appeal except in special and exceptional cases where it is manifest that by a disregard of the forms of legal process or by a violation of the principles of natural justice or otherwise substantial and grave injustice has been done. Where the appellant has been convicted notwithstanding the fact that the evidence is wanting on a most material part of the prosecution case, the Supreme Court will entertain the appeal. *Mohinder Singh* v. *The State,*

A I R 1953 S C 415.

(444) *Arts. 134, 136 — Power to look into evidence — Criminal P. C. (1898), S. 404.*

The Supreme Court will not look beyond the finding of fact arrived at by the Courts

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below, but where decision on the plea of alibi has been arrived at in disregard of the principle that the standard of proof which is required in regard to that plea must be the same as the standard which is applied to the prosecution evidence and in both cases it should be a reasonable standard. *Mohinder Singh* v. *The State,*

A I R 1953 S C 415.

(445) *Art. 134 — When no interference by Supreme Court.*

Supreme Court would not be justified in disturbing the decision of the Courts below merely on the ground that perhaps a different inference could also have been drawn from the facts found in the case. *Vijendrajit* v. *State of Bombay,*

A I R 1953 S C 247.

(446) *Art. 134 (1) (c) — Reasons for Certificate of fitness — (Criminal P. C. (1898), S. 376).*

If in any particular State there is only one Judicial Commissioner as the ultimate appellate authority, and if the confirmation of sentence of death has to be made by him, the procedure laid down must be followed. The fact that there is not a Bench of two Judges as in the High Courts to deal with death sentences is not an adequate ground for converting the Supreme Court into an ordinary Court of appeal and confirmation in such matters. *Kalawati* v. *Himachal Pradesh,*

A I R 1953 S C 131 = 1953 S C R 546 = 1953 S C J 144.

(447) *Arts. 134, 142 — Supreme Court, powers of.*

Where the Courts below in coming to their decision regarding the guilt of the accused relied to a considerable extent on the so-called admission of the accused which had no existence in fact.

Held that the proper order to make would be to direct a rehearing of the appeal on the evidence as it actually stood after excluding from consideration the alleged admission. *Darshan Singh* v. *State of Punjab,*

A I R 1953 S C 83 = 1953 S C R 319.

(448) *Arts. 134 and 136 — Concurrent findings of fact—Interference — Practice of Supreme Court — (Supreme Court — Practice—Concurrent findings of fact) — (Criminal P. C. (1898), S. 404).*

When the Court of first instance and the Court of appeal arrive at concurrent findings

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of fact after believing the evidence of a witness, the Supreme Court as the final Court does not disturb such findings, save in most exceptional cases. But where a finding of fact is arrived at on the testimony of a witness who is admittedly an accomplice and the Courts below depart from the rule of prudence that such testimony should not be accepted unless it is corroborated by some other evidence on the record, a finding of that character in the circumstances of a particular case may well be reviewed even on special leave if the other circumstances in the case require it, and substantial and grave injustice has resulted. *Hanumant* v. *State of M. P.*,

A I R 1953 S C 343
=1952 S C R 1091
=1952 S C J 509.

(449) *Art. 134 (1)—Argument on point of fact.*

It is not the function of the Supreme Court to reassess evidence and an argument on a point of fact which did not prevail with the Courts below cannot avail the appellants in the Supreme Court. *Lakshman Singh* v. *The State*,

A I R 1952 S C 167
=1952 S C R 839
=1952 S C J 230.

(450) *Art. 134—New point of fact.*

A question of fact which has to be investigated afresh cannot be allowed to be raised for the first time in appeal to the Supreme Court. *Rameshwar Bhartia* v. *State of Assam*, A I R 1952 S C 405.

(450.A) Article 136.

See also 1. AIR 1954 S C 20 (No. 439).
2. AIR 1953 S C 415 (No. 443).
3. AIR 1952 S C 343 (No 448). under Article 134 (Supra).
4. Acquittal.

(451) *Art. 136 — Criminal appeal on special leave—Appellants sentenced to death on opinion of third judge — Consideration of evidence — Practice — (Criminal P. C. (1898), S. 411A).*

Though ordinarily, the Supreme Court in a criminal Appeal would not enquire into the questions of fact yet where three persons have been sentenced to death on the opinion of the third judge despite the opinion of one that the death sentence should not be imposed and of the other that they are not guilty and so should be acquitted, the Supreme Court deemed it advisable to examine the evidence. *Pandurang* v. *State of Hyderabad*, A I R 1955 S C 216.

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(452) *Art. 136 (1) — Industrial Tribunal — Interference with decision of — (Industrial Disputes Act (1947), S. 15(1)).*

The Industrial Tribunals are Tribunals within the meaning of Art. 136 and that Article has vested in the Supreme Court exceptional and overriding power to interfere where it reaches the conclusion that a person has been dealt with arbitrarily or that a Court or Tribunal within the territory of India has not given a fair deal to a litigant. *Muir Mills* v. *Suti Mills Mazdoor Union*, A I R 1955 SC 170.

(453) *Art. 136 — Powers of Supreme Court under — Intent and purpose of the power—Finality of decisions of Tribunals —Effect of.*

It is not possible to define with any precision the limitations on the exercise of the discretionary jurisdiction vested in the Supreme Court by the constitutional provision made in Art. 136. The limitations, whatever they be, are implicit in the nature and character of the power itself. It being an exceptional and overriding power, naturally it has to be exercised sparingly and with caution and only in special and extraordinary situations. Beyond that it is not possible to fetter the exercise of this power by any set formula or rule.

All that can be said is that the Constitution having trusted the wisdom and good sense of the Judges of the Supreme Court in this matter, that itself is a sufficient safeguard and guarantee that the power will only be used to advance the cause of justice, and that its exercise will be governed by well established principles which govern the exercise of overriding constitutional powers. It is, however, plain that when the Court reaches the conclusion that a person has been dealt with arbitrarily or that a Court or Tribunal within the territory of India has not given a fair deal to a litigant, then no technical hurdles of any kind like the finality of finding of facts or otherwise can stand in the way of the exercise of this power because the whole intent and purpose of the article is that it is the duty of the Supreme Court to see that injustice is not perpetuated or perpetrated by decisions of courts and tribunals because certain laws have made the decisions to those Courts or

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Tribunals final and conclusive. *D. C. Mills Ltd.* v. *Commr. of L. T. W. B.*,

A I R 1955 S C 65.

(454) *Art. 136 (1) — Appreciation of oral evidence — Criminal P. C. S. 439 — Appreciation of oral evidence and finding of fact.*

The point for determination was one of fact largely depending on appreciation of oral evidence. The trial Magistrate dealt with the matter fully and was satisfied that prosecution case was established.

Held (a) that the High Court can rightly decline to interfere with the finding in revision.

(b) There was no substance in the contention that the High Court had given no reason for dismissing the revision and had not recorded any finding.

(c) In an appeal to the Supreme Court, such a case where matters turn on appreciation of oral evidence, the Supreme Court will not interfere. *Narayan Tewary* v. *State of West Bengal*,

A I R 1954 S C 726 (728).

(455) *Art. 136—Special appeal against the decision of Election Tribunal—Jurisdiction of Supreme Court to examine conclusion of facts.*

In a special appeal against the decision of an Election Tribunal the Supreme Court, as a Court of appeal will not examine the conclusions of fact arrived at by the Tribunal. All that the Supreme Court is concerned with is that whether a Tribunal of reasonable and unbiased men could judicially reach such a conclusion. Under the law the decision of the Tribunal is meant to be final. That does not take away the jurisdiction of the Supreme Court but it will only interfere when there is some glaring error which has resulted in a substantial miscarriage of justice. *Jamuna Prasad Mukhariya* v. *Lachhi Ram*,

A I R 1954 S C 686 (688)
=1954 S C J 835.

(456) *Art. 136—Interference with finding of fact.*

A finding of fact depending upon the merits or appreciation of the evidence is not open to reconsideration in an appeal brought by special leave.

Held that no flagrant error of law or procedure had been pointed out to the Supreme Court in the findings of the Courts below, nor was the Supreme Court satisfied

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that in arriving at findings of fact any miscarriage of justice had resulted to accused. *A. J. Peiris* v. *State of Madras*,

A I R 1954 S C 616 (621).

(457) *Arts. 136, 329 (b) — Power of Supreme Court to grant special leave to appeal against Election Tribunal's decision — (Representation of the People Act (1951), Ss. 80 and 105) — (Civil P. C. S. 9).*

The right of seeking election and sitting in Parliament or in a State Legislature is a creature of the Constitution and when the Constitution provides a special remedy for enforcing that right, no other remedy by ordinary action in a Court of law is available to a person in regard to election disputes. The jurisdiction with which the Election Tribunal is endowed is undoubtedly a special jurisdiction; but once it is held that it is a judicial Tribunal empowered and obliged to deal judicially with disputes arising out of or in connection with election, the overriding power of the Supreme Court to grant special leave in proper cases, would certainly be attracted and this power cannot be excluded by any Parliamentary legislation. The 'non obstante' clause with which Art. 329 of the Constitution, begins debars the Supreme Court, as it debars any other Court in the land, to entertain a suit or a proceeding calling in question any election to the Parliament or the State Legislature. It is the Election Tribunal alone that can decide such disputes, and the proceeding has to be initiated by an election petition and in such manner as may be provided by a statute. But once that Tribunal has made any determination or adjudication on the matter, the powers of the Supreme Court to interfere by way of special leave can always be exercised.

An appeal is a creature of statute and there can be no inherent right of appeal from any judgment or determination unless an appeal is expressly provided for by the law itself. The powers given by Art. 136 of the Constitution, however are in the nature of special or residuary powers which are exercisable outside the purview of ordinary law, in cases where the needs of justice demand interference by the Supreme Court of the land. The Article itself is worded in the widest terms possible. It vests in the Supreme Court a plenary jurisdiction in the matter of entertaining and hearing appeals

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by granting of special leave, against any kind of judgment or order made by a Court or tribunal in any cause or matter and the powers could be exercised in spite of the specific provisions for appeal contained in the Constitution or other laws. The Constitution for the best of reasons did not choose to fetter or circumscribe the powers exercisable under this Article in any way. Section 105 of the Representation of the People Act certainly gives finality to the decision of the Election Tribunal so far as that Act is concerned and does not provide for any further appeal but that cannot in any way cut down or affect the overriding powers which the Supreme Court can exercise in the matter of granting special leave under Art. 136 of the Constitution.

This overriding power, which has been vested in the Supreme Court under Art. 136 of the Constitution, is in a sense wider than the prerogative right of entertaining an appeal exercised by the Judicial Committee of the Privy Council in England. In the first place Art. 136 is a constitutional provision which, unlike the prerogative right of the Crown, no parliamentary legislation can limit or take away. In the second place the provision being one, which overrides ordinary laws, no presumption can arise from words and expressions declaring an adjudication of a particular Tribunal to be final and conclusive that there was an intention to exclude the exercise of the special powers. *Durga Shankar Mehta* v. *Raghuraj Singh*,

A I R 1954 S C 520 (522)
=1954 S C J 723.

(458) *Art. 136—Applicability of O. 41, R. 22, Civil P. C.*

Order 41, R. 22 has no application to an appeal granted by special leave under Art. 136. *Vashist Narain Sharma* v. *Dev Chandra*, A I R 1954 S C 513 (516).

(459) *Art. 136—Powers under, when to be exercised—Pleas available to appellant.*

Unless it is shown that exceptional and special circumstances exist, that substantial and grave injustice has been done and the case in question presents features of sufficient gravity to warrant a review of the decision appealed against, the Supreme Court does not exercise its overriding powers under Art. 136 (1) of the Constitution.

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The circumstance that because an appeal has been admitted by special leave does not entitle the appellant to open out the whole case and contest all the findings of fact and raise every point which could be raised in the High Court. Even at the final hearing only those points can be urged which are fit to be urged at the preliminary stage when the leave to appeal is asked for. *Hem Raj Devilal* v. *The State of Ajmer*,

A I R 1954 S C 462
=1954 S C J 449.

(460) *Art. 136 — Criminal case — Special leave to appeal — New Point — Entertainment of.*

In an appeal on special leave in a criminal case even though a new point was raised for the first time before the Supreme Court in that it was not raised before the High Court either during the hearing of the appeal or even at the time when the appellant applied for leave to appeal to the Supreme Court, still the Supreme Court considered the point on facts holding that there was no substance in the point which related to the injuries to have been caused by a lethal weapon with which they were alleged to have been caused. *Nawab Singh* v. *State of Uttar Pradesh*,

A I R 1954 S C 278 (279).

(461) *Art. 136 (1)—Special leave to appeal in criminal cases—When granted.*

The Supreme Court will not grant special leave to appeal under Art. 136 (1) of the Constitution unless it is shown that exceptional and special circumstances exist, that substantial and grave injustice has been done and the case in question presents features of sufficient gravity to warrant a review of the decision appealed against and that only those points can be urged at the final hearing of the appeal which are fit to be urged at the preliminary stage when leave is asked for. It is well established that Supreme Court does not by special leave convert itself into a Court to review evidence for a third time.

Where however the Court below fails in apprehending the true effect of a material change in the versions given by witnesses immediately after the occurrence and the narrative at the trial with respect to the nature and character of the offence, it would not be right for the Supreme Court to affirm such a decision when it occasions a failure of justice.

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Thus where in the statements made by the witnesses in the trial, the whole version as to the nature and character of the act of the accused has been completely changed and an act which on the facts stated in the first information report and on the statements made to the police may well be regarded either accidental or rash and negligent, has been deliberately made to look like an act of deliberate murder, such difference goes to the root of the case and if the High Court holds, on the basis of the evidence in the trial, that accused is guilty of the offence of murder under S. 302, I.P C., it is clearly in error and the Supreme Court can set aside the decision of the High Court. *Sadhu Singh* v. *The State of Pepsu*

A I R 1954 S C 271 (276).

(462) *Arts. 136 and 226—Scope — Representation of the People Act (1951), S. 105.*

Even when the Legislature states that the orders of a Tribunal under an Act like Representation of the People Act, 1951, S. 105, shall be conclusive and final, the High Court and the Supreme Court may interfere under Art. 226 and Art. 136 respectively. The powers conferred on the Supreme Court by Article 136 of the Constitution and on the High Courts under Article 226 cannot be taken away or whittled down by the Legislature. So long as these powers remain, discretion of the Supreme Court and that of the High Courts is unfettered. *Raj Krushna Bose* v. *Binod Kanungo*

A I R 1954 S C 202 (204) =1954 S C R 913=1954 S C J 286.

(463) *Art. 136 — Circumstances under which Supreme Court will not interfere.*

If there has been mere mistakes on the part of the Court below of a technical character which has not occasioned any failure of justice or if the question was purely one of the Supreme Court taking a different view of the evidence given in the case, there is no interference under the provisions of Article 136. Such questions are as a general rule treated as being for the final decision of the Courts below. *Habib Mohammad* v. *State of Hyderabad*

A I R 1954 S C 51 (61) =1954 S C R 475.

(464) *Art. 136 — Interference by Supreme Court.*

Where the High Court reverses the decision of the trial Court without noticing or

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giving due weight and consideration to important matters relied upon by that Court and its decision has to a large extent been influenced by suspicious circumstances disclosed at the trial which are undoubtedly prejudicial to the accused, but in regard to to which no opportunity of explanation was given to him when he was examined under the provision of S. 342, Cr. P. C. then these would be considered adequate grounds justifying interference by the Supreme Court in criminal appeals coming before it on special leave. *C. M. Narain* v. *State of Travancore-Cochin*

A I R 1953 S C 478.

(465) *Art. 136—Industrial Disputes — Question of jurisdiction—Cannot be raised for the first time in appeal to the Supreme Court.*

Held, where the question of jurisdiction is not a pure question of law, but it is mingled with facts, a party cannot be allowed to raise it for the first time in an appeal to the Supreme Court from the decision of the Appeallate Tribunal. *U. P. Bank* v. *Secretary, U. P. Bank E. Union*

A I R 1953 S C 437.

(466) *Art. 136—Substantial question of law.*

Where the decision of the matter in appeal by special leave before the Supreme Court depended on the construction of the leave rules of the Carnatic Mills which were in accordance with and similar in terms to provisions of Ch. IV-A, Factories Act.

Held, that the appeal involved a substantial question of law. *The Buckingham and Carnatic Co.* v. *Workers of the Buckingham and Carnatic Co. Ltd.*,

A I R 1953 S C 47.

(467) *Art. 136—Special leave without petition for it.*

(Per *Das J.*)—An intending appellant who has not applied for or obtained the leave of the High Court and who does not say a word by way of explanation as to why he did not apply to the High Court and as to why there has been great delay in applying to the Supreme Court should not get special leave from the Supreme Court for the mere asking. *Aswini Kumar* v. *Arabinda Bose*

A I R 1952 S C 369 =1953 S C R 1=1952 S C J 568.

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(468) *Art. 136 — Applicability—Judgments passed before 26-1-1950 by Courts in Nizam's territory.*

Under the words used in Art. 136 the Courts which passed judgments or sentence must be Courts within the territory of India. The territory of the Govt. of H. E. H. the Nizam was never the territory of India before 26-1-1950 and, therefore, the judgment and sentence passed by the High Court of H. E. H. the Nizam on the 12th, 13th and 14th December 1949, cannot be considered as judgments and sentence 'passed by a Court within the territory of India', and as such they do not fall within the class of judgments against which special leave to appeal to the Supreme Court can be asked for under Art. 136. It is also obvious that such judgments are not covered under Art. 135, Constitution of India. The Supreme Court has, therefore, no jurisdiction to entertain the petitions for special leave to appeal against such judgments of the High Court of Hyderabad under Art. 136. *Janardhan Reddy* v. *The State*,

AIR 1951 S C 124=1951 S C J 98
=1950 S C R 940.

(469) *Art. 136—Restropectivity.*

Prima facie every legislation is prospective and there is no reason to depart from this rule of interpretation in the case of Art. 136 of the Constitution. Even without the use of the word 'hereafter' the Article conveys the same meaning. *Janardhan Reddy* v. *The State*,

AIR 1951 S C 124=1951 S C J 98
=1950 S C R 940.

(470) *Arts. 139 and 226—Writ of certiorari—When may issue.*

When the executive authority has to form an opinion about an objective matter as a preliminary step to the exercise of a certain power conferred on it, the determination of the objective fact and the exercise of the power based thereon are alike matters of an administrative character and are not amenable to the writ of *certiorari*. When the law under which the authority is making a decison, itself requires a judicial approach, decision will be quasi-judicial. Prescribed forms of procedure are not necessary to make an inquiry judicial, provided in coming to the decision the well-recognised principles of approach are required to be followed.

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Therefore, wherever any body of persons having legal authority to determine questions affecting rights of subjects and having the duty to act judicially, act in excess of their legal authority a writ of *certiorari* may issue. *Province of Bombay* v. *Khushaldas*,

AIR 1950 S C 222
=1950 S C J 451
=1950 S C R 621.

(471) *Arts. 139 and 226—Bombay Land Requisition Ordinance (V [5] of 1947), S. 3 — Decision about public purpose — Writ of certiorari, if may issue :* A I R 1949 Bom 277, *Reversed.*

Per *Kania C. J., Fazl Ali, Patanjali Sastri and Das JJ., (Mahajan and Mukherjea JJ., contra)* — The decision of the Government about a public purpose is a fact which it has to ascertain or decide, and thereafter the order of requisition has to follow. The decision of the Provincial Government as to the public purpose contains no judicial element in it. The inquiries mentioned in Ss. 10 and 12 are only permissive and the Government is not obliged to make them. Moreover, they do not relate to the purpose for which the land may be required. They are in respect of the condition of the land and such other matters affecting land. The words of S. 3 read with the proviso, and the words of S. 4 taken along with the scheme of the whole Ordinance, do not import into the decision of the public purpose the judicial element required to make the decision judicial or quasi-judicial. The decision of the Provincial Government about public purpose is therefore, an administrative act, and there is no scope for an application for a writ of *certiorari* : A I R 1949 Bom 277, *Reversed. Province of Bombay* v. *Khushaldas*,

AIR 1950 S C 222=1950 S C J 451
=1950 S C R 621.

(472) *Art. 136 — Powers of Supreme Court — Special leave to appeal — When granted.*

On a careful examination of Art. 136 along with the preceding article, it seems clear that the wide discretionary power with which the supreme Court is invested under it is to be exercised sparingly and in exceptional cases only, and as far as possible a more or less uniform standard should be adopted in granting special leave in the wide range of matters which can come up before it under this article. By

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virtue of this article, Supreme Court can grant special leave in civil cases, in criminal cases, in income-tax cases, in cases which come up before different kinds of tribunal and in a variety of other cases. The only uniform standard which can be laid down in the circumstances is that Court should grant special leave to appeal only in those cases where special circumstances are shown to exist. *Pritam Singh* v. *State of Madras*,

AIR 1950 S C 169
=1950 S C R 453.

(473) *Art. 136 — Decision given by Industrial Tribunal — Appeal to Supreme Court on—Competency of—Industrial Disputes Act (1947), S. 15.*

Per *Kania C. J., Fazl Ali and Mahajan JJ.*; *Mukherjea and Patanjali Sastri JJ., Contra* — Certain words used in Art. 136 seem to have a special significance; these words are 'determination' 'cause or matter' and 'tribunal.' These words greatly widen the scope of Art. 136. They show that an appeal will lie from a determination or order of 'any tribunal' in any cause or matter. Thus, the wording of Art. 136 is wide enough to give jurisdiction to the Supreme Court to entertain an application for leave to appeal.

Per *Fazl Ali J.* — "The proviso to S. 15 (2), Industrial Disputes Act, relates to a very special type of case (i.e., where the Government is a party to the dispute) and as at present advised I do not wish to express any opinion as to whether an appeal lies to this Court or not in such a case, but, in my judgment, where the Government has only to declare the award to be binding an appeal shall lie." *Bharat Bank* v. *Employees Bharat Bank*,

AIR 1950 S C 188
=1950 S C R 459.

(474) *Art. 136—Exercise of extraordinary power given by Art. 136—Decision of Industrial Tribunal—Appeal on—Function of Supreme Court — Industrial Disputes Act (1947), S. 15.*

Per *Kania C. J.* — Even though the Supreme Court has jurisdiction to grant leave to appeal from a decision given by an Industrial Tribunal, yet having regard to the nature of the functions of the Industrial Tribunal the Supreme Court will be very reluctant to entertain an application for leave to appeal.

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Per *Mahajan J.*—The Supreme Court is not to substitute its decision for the determination of the Industrial Tribunal when granting relief under Art. 136. When it chooses to interfere in the exercise of these extraordinary powers, it does so because the tribunal has either exceeded its jurisdiction or has approached the questions referred to it in a manner which is likely to result in injustice or has adopted a procedure which runs counter to the well-established rules of natural justice; in other words, if it has denied a hearing to a party or has refused to record his evidence or has acted in any other manner, in an arbitrary or despotic fashion. In such circumstances, no question arises of this Court constituting itself into a tribunal and assuming powers of settling a dispute. All that the Court when it entertains an appeal would do is to quash the award and direct the tribunal to proceed within the powers conferred on it and to approach the adjudication of the dispute according to principles of natural justice. This Court under Art. 136 would not constitute itself into a mere Court of error. Extraordinary powers have to be exercised in rare and exceptional cases and on well-known principles. *Bharat Bank* v. *Employees of Bharat Bank*,

A I R 1950 S C 188
= 1950 S C R 459

(474A)—**Art. 166.**

See also, A I R 1952 S C 350; A I R 1952 S C 181, under Public Safety.

(475) *Art. 166 — Non-compliance with —Effect.*

Clauses (1) and (2) of Art. 166 are directory only and non-compliance with them does not result in the order being invalid, and in order to determine whether there is compliance with these provisions all that is necessary to be seen is whether there has been substantial compliance with those requirements. A I R 1952 S C 181, *Rel. on.*

Held, that the notice signed by the Chief Secretary of the State and expressed to be on behalf of the Government and giving opportunity to the petitioner to show cause against the action proposed to be taken against him was in substantial compliance with the provisions of the article. *P. Joseph* v. *State of Travancore-Cochin*,

A I R 1955 S C 160

(476) *Art. 166 (1) — Expressed to be taken in the name of — Meaning — Order*

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of detention issued as 'directed by Government' and 'by order of the Governor' — Validity — (Public Safety — Preventive Detention Act (1950), S. 3 (1)).

One of the meanings of "expressed" is to make known the opinions or the feelings of a particular person and when a Secretary to Government apprehends a man and tells him in the order that it is being done under the order of the Governor, he is in substance saying that he is acting in the name of the Governor and, on his behalf, is making known to the detenu the opinion and feelings and orders of the Governor. The Constitution does not require a magic incantation which can only be expressed in a set formula of words. What the court has to see is whether the substance of the requirements of Art. 166 (1) is there.

An order of detention under S. 3 (1) of the Preventive Detention Act, 1950, stated in the preamble "whereas the Government of Bombay was satisfied . . ." and its operative part read; "Now therefore, . . . the Government of Bombay is pleased to direct that the said Shri . . . . be detained.

By order of the Governor of Bombay
Sd/- x.x.x.x.

Secretary to the Government of Bombay, Home Department."

Held that the order was "expressed" to be made in the name of the Governor as required by Art. 166 (1) because it said "By order of the Governor."

Further that though the addition of the words "and in his name" to the words "By order of the Governor of Bombay" would have placed the matter beyond controversy, the order which purported to be an order of the Governor of Bombay could not be otherwise than in his name. *State of Bombay* v. *Purushottam Jog*,

A I R 1952 S C 317=1952 S C R 674
= 1952 S C J 503

(477) *Art. 166 (1)—Executive order of Government of State — Proof of—Calling of Minister in charge — Necessity.*

It is not necessary in every case to call the Minister in charge. If the Secretary, or any other person, has the requisite means of knowledge and his affidavit is believed, that will be enough to prove that the order was validly made by the Government of the State. *State of Bombay* v. *Purushottam Jog*,

A I R 1952 S C 317
= 1952 S C R 674
= 1952 S C J 503

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(478) *Art. 166 (1) — Executive order of State Government — Proof of — Form of verification of affidavit — (Civil P. C. (1908), O. 19, R. 3).*

The verification of an affidavit filed by a Government officer to prove that certain order was validly made by the State Government should invariably be modelled on the lines of Order 19, Rule 3, Civil P. C., whether the Code applies in terms or not. And when the matter deposed to is not based on personal knowledge the sources of information should be clearly disclosed. I L R 37 Cal 259, *Ref. State of Bombay* v. *Purushottam Jog*,

A I R 1952 S C 317=1952 S C R 674
= 1952 S C J 503

(479) *Art. 196 — U. P. Zamindari Abolition and Land Reforms Act, 1950 (Act 1 of 1951) — Article 31 (4) applied.*

U. P. Zamindari Abolition and Land Reforms Bill was introduced in U.P. Legislative Assembly but the Assembly prorogued on 21st Jan. 1950. The Bill was re-introduced after the 26th January, 1950. Held, the Bill did not lapse and was pending when the Constitution came into force. Re-introduction of the Bill afterwards did not mean introduction of new Bill and Article 31 (4) applied. *Raja Surya Pal Singh* v. *The State of U. P.*

A I R 1952 S C 52
=1952 S C R 1056=1952 S C J 354.

(480) *Arts. 190 (3), 192 (1)—Scope.*

Articles 190 (3) and 192 (1) are applicable only to disqualifications to which a member becomes subject after he is elected as such, and neither the Governor nor the Commission has jurisdiction to enquire into a member's disqualification which arose long before his election. *Election Commission* v. *Saka Venkta Rao*

A I R 1953 S C 210
=1953 S C R 1144
= 1953 S C J 293.

(481) *Arts. 200, 31 (3), (4) — Scope—Whether assent of both Governor and President necessary.*

Held Article 200 does not contemplate the Governor giving the assent and thereafter, when the Bill has become full-fledged law, reserving it for the consideration of the

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President. Indeed, the Governor is prohibited from giving his assent where such reservation by him is made compulsory. The Constitution would thus seem to contemplate only "bills" passed by the House or Houses of the Legislature being reserved for the consideration of the President and not "Laws" to which the Governor has already given his assent. Article 31 (3) must, therefore, be understood as having reference to what in historical sequence, having been passed by the House or Houses of the State Legislature and reserved by the Governor for the consideration of the President and assented to by the latter, has thus become a law. It is not intended that such a law should have the assent of both the Governor and the President. *State of Bihar* v. *Maharajadhiraja Sir Kameshwar Singh of Darbhanga*

A I R 1952 S C 252
= 1952 S C J 354
=1952 S C R 889.

(482) *Arts. 200, 31 (3) and 31 (4) — Performance of duties entrusted by these Articles to the President at one and same time.*

Held—It cannot be said that the President cannot perform both the duties, entrusted to him by Articles 200 and 31 (3) and (4) at one and the same time. He is not disabled under the Constitution from applying his mind to a Bill once and for all and to see whether it has to be passed into law and whether it fulfils the requirements of Art. 31 (2). *Raja Surya Pal Singh* v. *The State of U. P.*

A I R 1952 S C 52
= 1952 S C J 354
=1952 S C R 1056.

(483) *Art. 212 (1) — Irregularity of procedure — Omission to put question by Speaker as required by rules governing legislative business.*

One of the Ministers moved that the C. P. and Berar Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Bill as considered by the House be passed into law. Thereupon the Speaker read the motion to the House and this was followed by several speeches welcoming the measure. The official report of the proceedings did not record that the Speaker put the question as required by R. 20 (1) of the Rules governing the legislative business and that the motion was carried. The original bill signed and authenticated by the Speaker however contained an endorsement by the Speaker that the bill was passed by the Assembly on 5.4.1950. The endorsement was signed by the Speaker on 10.5.1950. The official report of the proceedings was prepared on 21.6.1950 and was signed by the Speaker on 1.10.1950. *Held* that the omission as to the motion having been put and carried could not, in the face of the explicit statement by the Speaker endorsed on the bill, be taken to establish that the bill was not put to the House and carried by it. In any case, the omission to put the motion formally to the House, even if true, was, in the circumstances, no more than a mere irregularity of procedure as it was not disputed that the overwhelming majority of the members present and voting were in favour of carrying the motion and no dissentient voice was actually raised. *State of Bihar* v. *Kameshwar Singh*

A I R 1952 S C 252
=1952 S C R 889
=1952 S C J 354.

(483-A) **Art. 214.**

See A I R 1954 S C 526 under United States of Travancore & Cochin High Court Act.

(483-B) **Art. 215.**

See also A I R 1953 S C 436, under Contempt of Courts Act, 1926, S. 1.

(484) *Art. 215 — Contempt proceedings pending before High Court — Power of Supreme Court to transfer proceedings under Criminal P. C., S. 527 —(Cr. P. C. Ss. 527 and 5).*

The power of a High Court to institute proceedings for contempt of Court and punish where necessary is a special jurisdiction, such proceedings are not governed by the Criminal Procedure Code, 1898. Hence, the Supreme Court has no power under S. 527, Criminal P. C. to transfer such proceedings from one High Court to another. There is no other power which the Supreme Court can exercise in this respect. Article 215 of the Constitution gives every High Court the right and the power to punish a contempt of itself. Neither the Supreme Court nor the Legislature can deprive a High Court of the right which is so vested in it. Further the proceedings cannot be transferred from one judge to another, there being no original jurisdiction which the Supreme Court can exercise. It is not a fundamental right and so Art. 32

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has no application. Dicta : It is desirable on general principles of justice that a judge who has been personally attacked should not as far as possible hear a contempt matter which, to that extent, concerns him personally. The judges should bear in mind the oft-quoted maxim that justice must not only be done but must be seen to be done by all concerned and most particularly by an accused person who should always be given, as far as that is humanly possible, a feeling of confidence that he will receive a fair, just and impartial trial by judges who have no personal interest or concern in his case. *Sukhdev Singh* v. *Hon'ble C. J., S. Teja Singh and the Hon'ble Judges of the Pepsu High Court at Patiala.*

A I R 1954 S C 186 (187, 190)
=1954 S C R 454=1954 S C J 67.

(484-A) **Art. 226.**

See also 1. A I R 1953 S C 38, under Industrial Disputes.

2. Art. 32.
Applicability.
Scope.
Construction.
Discretion of Court.
Duty of Court.
Jurisdiction of High Court.
Writ of Certiorari.
Writ of Mandamus.
Writ of Prohibition.

(485) *Arts. 226, 19 and 31—Applicability—Illegal seizure of goods in petitioner's possession in India at instance of Jammu and Kashmir Police — Infringement of — Fundamental rights—Writ under Art. 226 —Remedy under S. 523, Criminal P. C.— (Criminal P. C. (1898), S. 523).*

Where the police in India seized goods in possession of the petitioner in India, at the instance of Police of Jammu and Kashmir, and the seizure was not under any authority of law, inasmuch as they were not under orders of any Magistrate nor were they under any of the sections 51, 95, 98 and 165 of the Cr. P. C., since no report of any offence committed by the petitioner was made to the Police in India and the Indian Police were not authorised to make any investigation and the whole affair was a hole-and-corner affair between the officers of the Kashmir Police and the Indian Police the seizure of the goods from the possession of the petitioner amounted to an

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infringement of his fundamental rights both under Art. 19 and Art. 31 and relief should be granted to him under Art. 226.

The fact that the petitioner had made an application under S. 523, Criminal P. C. to the Magistrate will not bar the remedy under Art. 226, inasmuch as S. 523 would have no application to the facts of the case and the Magistrate would have no jurisdiction to order the return of the goods. *Wazir Chand* v. *The State of Himachal Pradesh*

A I R 1954 S C 415 (417)
=1954 S C J 600.

(486) *Art. 226 — Scope of — Grant of permits under Motor Vehicles Act.*

Such writs as are referred to in Article 226 are obviously intended to enable the High Court to issue them in grave cases where the subordinate tribunals or bodies or officers act wholly without jurisdiction, or in excess of it, or in violation of the principles of natural justice, or refuse to exercise a jurisdiction vested in them, or there is an error apparent on the face of the record, and such act, omission, error, or excess has resulted in manifest injustice. However extensive the jurisdiction may be, it is not so wide or large as to enable the High Court to convert itself into a Court of appeal and examine for itself the correctness of the decisions impugned and decide what is the proper view to be taken or the order to be made. The Motor Vehicles Act is a statute which creates new rights and liabilities and prescribes an elaborate procedure for their regulation. No one is entitled to a permit as of right even if he satisfies all the prescribed conditions. The grant of a permit is entirely within the discretion of the transport authorities and naturally depends on several circumstances which have to be taken into account. There is a complete and precise scheme for regulating the issue of permits, providing what matters are to be taken into consideration as relevant, and prescribing appeals and revisions from subordinate bodies to higher authorities. The remedies for the redress of grievances or the correction of errors are found in the statute itself and it is to these remedies that resort must generally be had :

Held that this was not a case for interference with the discretion that was exercised by Transport Authorities paying regard to all the facts and the surrounding

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circumstances. *Veerapa* v. *Raman and Raman Ltd.*, A I R 1952 S C 192 =1952 S C R 583 =1952 S C J 261.

(487) *Art. 226—Scope of—Proceedings under Art. 226.*

Article 226 confers on High Courts power to issue appropriate writs to any person or authority within their territorial jurisdiction, in terms absolute and unqualified. Election Tribunals functioning within the territorial jurisdiction of the High Courts fall within the sweep of that power. If the High Courts are to recognise or admit any limitation on this power, that must be founded on some provision in the Constitution itself. *Hari Vishnu* v. *Ahmad Ishaque* A I R 1955 S C 233.

(488) *Arts. 226, 132 — Construction— "For any other purpose" — Meaning of— Interim relief without decision on rights— Final order.*

The issuing of writs or directions by the High Court is founded only on its decision that a right of the aggrieved party under Part III of the Constitution (Fundamental Rights) has been infringed. It can also issue writs or give similar directions for any other purpose. The concluding words of Art. 226 have to be read in the context of what precedes the same. Therefore, the existence of the right is the foundation of the exercise of jurisdiction of the Court under this Article.

The Government of Orissa having passed an order cancelling the temporary permits and having directed the respondents to remove their assets appertaining to the mines within a fortnight, the respondents filed an application for a writ of mandamus. The High Court declined to investigate and pronounce on the rights of the parties and expressly kept the determination thereof in abeyance in the suit proposed to be filed by the respondents but held that at the moment the respondents had no alternative legal remedy, equally convenient, beneficial and effectual because the respondents could not file a suit till after the expiry of the period of sixty days required for the purpose under S. 80, Civil P. C., and unless protected by the Court in the meanwhile the respondents would undergo irreparable and irremediable loss of possession of the mining leases involving a huge waste of labour, machinery

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and other resources of equipments of immense value hardly capable of being remedied by payments of money as compensation. The High Court therefore passed an order that till three months from the day of the order or one week after the institution of their contemplated suit, whichever was earlier, the Government of the State of Orissa should refrain from disturbing the petitioners' possession over the mining areas in question and that thereafter the order would cease to have effect :

Held that (1) with the passing of the order by the High Court the applications of the respondents were completely disposed of and as the directions embodied the Final Order passed by the High Court an appeal against the order to the Supreme Court was maintainable. The fact that the operation of the order was limited to three months or a week after the filing of the intended suit did not prevent the order being final.

(2) Article 226 cannot be used for the purpose of giving interim relief as the only and final relief on the application. The directions had been given here only to circumvent the provisions of S. 80, Civil P. C., and that was not within the scope of Art. 226. An interim relief can be granted only in aid of and as ancillary to the main relief which may be available to the party on final determination of his rights in suit or proceeding. If the Court was of opinion that there was no other convenient or adequate remedy open to the petitioners, it might have proceeded to investigate the case on its merits and come to a decision as to whether the petitioners succeeded in establishing that there was an infringement of any of their legal rights which entitled them to a writ of *mandamus* or any other directions of a like nature; and pending such determination it might have made a suitable interim order for maintaining the *status quo ante*. But when the Court declined to decide on the rights of the parties and expressly held that they should be investigated more properly in a civil suit, it could not for the purpose of facilitating the institution of such suit, issue directions in the nature of temporary injunctions, under Art. 226 of the Constitution. The language of Art. 226 does not permit such an action: I L R (1951) Cut 398, REVERSED. *State of Orissa* v. *Madan Gopal*, A I R 1952 S C 12 =1951 S C J 764=1952 S C R 28.

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(489) *Art. 226—Discretion of Court—Other remedy available and being pursued.*

The remedy provided for in Art. 226 of the Constitution is a discretionary remedy and the High Court has always the discretion to refuse to grant any writ if it is satisfied that the aggrieved party can have an adequate or suitable relief elsewhere. Where the petitioners have already availed themselves of the remedy provided for in S. 8 (5) of the Taxation of Income (Investigation Commission) Act, and a reference has been made to the High Court in terms of that provision which is awaiting decision, it would not be proper to allow the petitioners to invoke the discretionary jurisdiction under Art. 226 of the Constitution, at this stage. In case the proceeding occasions a gross miscarriage of justice, there is always the jurisdiction in the Supreme Court to interfere by way of special leave. *K. S. Rashid and Son* v. *Income-tax Investigation Commission*,

A I R 1954 S C 207 (210) =1954 S C J 264=1954 S C R 738.

(490) *Art. 226 — Duty of Court.*

It is always desirable, when relief under Art. 226 is sought on allegations of infringement of fundamental rights, that the Court should satisfy itself that such allegations are well founded before proceeding further with the matter. *State of Bombay* v. *United Motors Ltd.*,

A I R 1953 S C 252.

(491) *Art. 226 — Jurisdiction of High Court to issue writ of certiorari — Existence of person or authority.*

The true import of the language of Art. 226 does not support the argument that the wording of Art. 226 that the High Court shall have the power to issue writs or directions to any person or authority within its territorial jurisdiction posits that there exists a person or authority to whom it could be issued, and that in consequence, they cannot be issued where no such authority exists. The scope of Art. 226 is firstly that it confers on the High Courts power to issue writs and directions, and secondly, it defines the limits of that power. This latter it does by enacting that it can be exercised over any person or authority within the territories in relation to which it exercises its jurisdiction. The emphasis is on the words "within the territory", and their significance is that the jurisdiction to issue writ is co-extensive

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with the territorial jurisdiction of the Court. The reference is not to the nature and composition of the Court or tribunal but to the area within which the power could be exercised. *Hari Vishnu* v. *Ahmad Ishaque*, **A I R 1955 S C 233.**

(492) *Art. 226 — Jurisdiction of High Court—Writ of certiorari for quashing — Nature of such writ — Election Tribunal becoming 'functus officio' — Writ of certiorari can still be issued.*

The High Courts have power under Art. 226 to issue writs of certiorari for quashing the decisions of election Tribunals, notwithstanding that they become 'functus officio' after pronouncing the decisions. The writ of certiorari for quashing is directed against a record, and as a record can be brought up only through the human agency, it is issued to the person or authority whose decision is to be reviewed. As it is the record of the decision that has to be removed by certiorari, the fact that the tribunal has become 'functus officio' subsequent to the decision can have no effect on the jurisdiction of the Court to remove the record.

Under S. 103 of the Representation of the People Act, 1951, the Tribunal is directed to send the records of the case after the order is pronounced either to the relative District Judge or to the Chief Judge of the Court of Small Causes, and there is no legal impediment to a writ being issued to those officers to transmit the record to the High Court. The power to issue a writ under Art. 226 to a person as distinct from an authority is sufficiently comprehensive to take in any person, who has the custody of the record, and the officers mentioned in S. 103 of the Act would be persons who would be amenable to the jurisdiction of the High Court under the article. (1948) 1 All E. R. 438, *Rel. on.*; Civil Appeal No. 42 of 1952 (S. C.), *Expl.*; (1921) 2 A. C. 570, *Disting.* *Hari Vishnu* v. *Ahmad Ishaque*,

A I R 1955 S C 233.

(493) *Art. 226 — Jurisdiction of High Court — To issue writ to Investigation Commission at Delhi investigating case of assessees in State of U. P. — (Taxation of Income (Investigation Commission) Act (1947), S. 5).*

While Art. 225 of the Constitution preserves to the existing High Courts the powers and jurisdictions which they had

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previously, Art. 226 confers, on all the High Courts, new and very wide powers in the matter of issuing writs which they never possessed before. There are only two limitations placed upon the exercise of these powers by a High Court under Art. 226 of the Constitution, one is that the power is to be exercised "throughout the territories in relation to which it exercises jurisdiction", that is to say, the writs issued by the Court cannot run beyond the territories subject to its jurisdiction. The other limitation is that the person or authority to whom the High Court is empowered to issue writs must be "within those territories" and this implies that they must be amenable to its jurisdiction either by residence or location within those territories. It is with reference to these two conditions thus mentioned that the jurisdiction of the High Courts to issue writs under Art. 226 of the Constitution, is to be determined. The Punjab High Court has jurisdiction to issue writ to the Investigation Commission in Delhi investigating under S. 5 of the Act 30 of 1947, the case of the petitioners, who were the assessees within the U. P. State and whose original assessments were made by the Income-tax authorities of that State, even though subsequent proceedings, which would have to be taken in pursuance of the report of the Investigation Commission would have to be taken by the Income-tax authorities in the U. P. and if a case would have to be stated, it would have to be stated to the High Court of Allahabad. *K. S. Rashid and Son* v. *Income-tax Investigation Commission*,

A I R 1954 S C 207 (209, 210)
=1954 S C J 264=1954 S C R 738.

(494) *Art. 226—Jurisdiction of High Court.*

High Court of Madras cannot issue any writ under Art. 226 to Election Commission having its offices permanently located at New Delhi. A. I. R. 1943 P. C. 164, *Distinguished. Election Commission* v. *Saka Venkata Rao.*

A I R 1953 S C 210
=1953 S C R 1144
=1953 S C J 293.

(495) *Art. 226—Jurisdiction of High Court under.*

The High Court did not content itself with merely quashing the proceedings, under the Motor Vehicles Act, it went further and directed the Regional Transport Authority.

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"to grant to the petitioner permits in respect of the five buses in respect of which a joint application was made originally by the petitioner and one B and that in case the above buses had been condemned, the petitioner was to be at liberty to provide substitutes within such time as may be prescribed by the authorities:

Held that such a direction was clearly in excess of its powers and jurisdiction. *Veerappa* v. *Raman and Raman Ltd.*,

A I R 1952 S C 192
=1952 S C R 583
=1952 S C J 261.

(496) *Art. 226 — Certiorari to correct error of law.*

A writ of certiorari can be issued to correct an error of law. But it is essential that it should be something more than a mere error; it must be one which must be manifest on the face of the record. (1952) 1 K. B. 338, A. I. R. 1952 S C 192, A. I. R. 1954 S C 440, *Rel. on. Hari Vishnu* v. *Ahmad Ishaque.*

A I R 1955 S C 233.

(497) *Art. 226—Conditions under which certiorari can lie.*

With regard to the character and scope of the writ of certiorari and the conditions under which it can be issued, the following propositions may be taken as established: (1) Certiorari will be issued for correcting errors of jurisdiction, as when an inferior Court or Tribunal acts without jurisdiction or in excess of it, or fails to exercise it. (2) Certiorari will also be issued when the Court or Tribunal acts illegally in the exercise of its undoubted jurisdiction, as when it decides without giving an opportunity to the parties to be heard, or voilates the principles of natural justice. (3) The Court issuing a writ of certiorari acts in exercise of a supervisory and not appellate jurisdiction. One consequence of this is that the Court will not review findings of fact reached by the inferior Court or Tribunal, even if they be erroneous. This is on the principle that a Court which has jurisdiction over a subject-matter has jurisdiction to decide wrong as well as right, and when the Legislature does not choose to confer a right of appeal against that decision; it would be defeating its purpose and policy, if a superior Court were to rehear the case on the evidence and substitute its own findings in certiorari. A. I. R. 1952 S C 179—A. I. R 1952 S C 192—

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A. I. R. 1952 S C 319 and A. I. R. 1954 S C 440, *Rel. on. Hari Vishnu* v. *Ahmad Ishaque.*

A I R 1955 S C 233.

(498) *Arts. 226 and 329 (b)—Certiorari—Meaning of 'election' in Art. 329 (b)—Bar to writs—Power subject to other provisions of Constitution — Writ against election Tribunal.*

The word 'election' in Art. 329 (b), is used in a comprehensive sense as including the entire process of election commencing with the issue of a notification and terminating with the declaration of election of a candidate. An application under Art. 226 challenging the validity of any of the acts forming part of that process will be barred. These are instances of original proceedings calling in question an election, and will be within the prohibition enacted in Art. 329 (b). But when once proceedings have been instituted in accordance with Art. 329 (b) by presentation of an election petition, the requirements of that article are fully satisfied. Thereafter when the election petition is in due course heard by a Tribunal, and decided, whether its decision is open to attack, and if so, where and to what extent, must be determined by the general law applicable to decisions of the Tribunals. And as they are subject to the supervisory jurisdiction of the High Courts under Art. 226, a writ of certiorari under that article will be competent against decisions of the election Tribunals also. A. I. R. 1952 S C 64 Foll; A. I. R. 1954 S C 520 *Rel. on. Hari Vishnu* v. *Ahmad Ishaque.*

A I R 1955 S C 233.

(499) *Art. 226 — Certiorari—Essential features, effect and conditions under which writ is issued.*

One of the fundamental principles in regard to the issuing of a writ of certiorari, is, that the writ can be availed of only to remove or adjudicate on the validity of judicial acts. The expression "judicial acts" includes the exercise of quasi-judicial functions by administrative bodies or other authorities or persons obliged to exercise such functions and is used in contrast with what are purely ministerial acts. The second essential feature of a writ of certiorari is that the control which is exercised through it over judicial or quasi-judicial tribunals or bodies is not in an appellate but supervisory capacity. In granting a writ of certiorari the

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superior Court does not review or reweigh the evidence upon which the determination of the inferior tribunal purports to be based. It demolishes the order which it considers to be without jurisdiction or palpably erroneous but does not substitute its own views for those of the inferior tribunal.

The supervision of the superior Court exercised through writs of certiorari goes on two points. One is the area of inferior jurisdiction and the qualifications and conditions of its exercise; the other is the observance of law in the course of its exercise. These two heads normally cover all the grounds on which a writ of certiorari could be demanded.

Certiorari may and is generally granted when a Court has acted without or in excess of its jurisdiction. The want of jurisdiction may arise from the nature of the subject-matter of the proceeding or from the absence of some preliminary proceeding or the Court itself may not be legally constituted or suffer from certain disability by reason of extraneous circumstances. When the jurisdiction of the Court depends upon the existence of some collateral fact, it is well settled that the Court cannot by a wrong decision of the fact give it jurisdiction which it would not otherwise possess.

A tribunal may be competent to enter upon an enquiry but in making the enquiry it may act in flagrant disregard of the rules of procedure or where no particular procedure is prescribed, it may violate the principles of natural justice. A writ of certiorari may be available in such cases. An error in the decision or determination itself may also be amenable to a writ of certiorari but it must be a manifest error apparent on the face of the proceedings, e.g., when it is based on clear ignorance or disregard of the provisions of law. In other words, it is a patent error which can be corrected by certiorari but not a mere wrong decision. *T. C. Bassappa* v. *T. Nagappa,* **A I R 1954 S C 440 (444) =1954 S C J 695.**

(500) *Art. 226 — Judicial Tribunal — (Special Tribunal) — Test — (Civil P. C. (1908), S. 9).*

A true judicial decision presupposes an existing dispute between two or more parties and then involves four requisites :—(1) the presentation (not necessarily orally) of their case by the parties to the dispute; (2) if the dispute between them is a question of fact, the ascertainment of the fact by means of evi-

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dence adduced by the parties to the dispute and often with the assistance of argument by or on behalf of the parties on the evidence ; (3) if the dispute between them is a question of law, the submission of legal argument by the parties, and (4) a decision which disposes of the whole matter by a finding upon the facts in dispute and application of the law of the land to the facts so found, including where required a ruling upon any disputed question of law. A I R 1950 S C 188 ; (1937) 2 K B 309, *Foll. Maqtool Hussain* v. *State of Bombay*,

A I R 1953 S C 325
=1953 S C R 730=1953 S C J 456.

(501) *Art. 226—Certiorari—Applicability of principles of English law.*

As is well known, the issue of the prerogative writs, within which certiorari is included, had their origin in England in the King's prerogative power of superintendence over the due observance of law by his officials and Tribunals. The writ of certiorari is so named because in its original form it required that the King should be "certified of" the proceedings to be investigated and the object was to secure by the authority of a superior Court that the jurisdiction of the inferior Tribunal should be properly exercised. These principles were transplanted to other parts of the King's dominions. In India, during the British days the three chartered High Courts of Calcutta, Bombay and Madras were alone competent to issue writs and that too within specified limits and the power was not exercisable by the other High Courts at all. The language used in Arts. 32 and 226 of the Constitution is very wide and the powers of the Supreme Court as well as of all the High Courts in India extend to issuing of orders, writs of hebeas corpus, mandamus, quo warranto, prohibition and certiorari as may be considered necessary for enforcement of the fundamental rights and in the case of the High Courts, for other purposes as well. In view of the express provisions in our Constitution the Court need not now look back to the early history or the procedural technicalities of these writs in English law, nor feel oppressed by any difference or change of opinion expressed in particular cases by English Judges. It can make an order or issue a writ in the nature of certiorari in all appropriate cases and in appropriate manner, so long as it keeps to the broad and

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fundamental principles that regulate the exercise of jurisdiction in the matter of granting such writs in English law. *T. C. Basappa* v. *T. Nagappa*,

A I R 1954 S C 440 (443)
=1954 S C J 695.

(502) *Art. 226—Writ of certiorari.*

A petition for declaring the election of the successful candidate void and holding the petitioner elected was presented and the allegation made was that but for the corrupt practices of the successful candidate the petitioner would have secured the majority votes, the difference between him and the successful candidate being only thirty-four votes. He further alleged that the irregularity in commencing polling at one of the centres half an hour later than the due time had materially affected the results because many people who had come at the proper time and out of whom many would probably have voted for the petitioner had returned without voting. There was evidence to show that some voters went away without voting because the polling did not commence at the scheduled time but there was no positive evidence as to the number of persons who had gone away without voting and it was also not possible to have any evidence as to how many of such persons would have voted for the petitioner. The Tribunal declared the petitioner elected on the specific finding that but for the corrupt practices of the successful candidate the petitioner would have got the majority of votes. It however discussed the matter relating to the late commencement of polling only in connection with the question as to whether there was violation of any statutory rule or order in the holding of election which would entitle it to declare the election of the successful candidate void under S. 100 (2) (c) of the Act :

Held, that if the Tribunal had on the basis of the facts relating to late commencement of polling alone declared the petitioner to be the duly elected candidate holding that he could have secured more votes than the successful candidate, obviously that would have been an error apparent on the face of the record, as such conclusion would rest merely on a surmise and nothing else. But as the Tribunal declared the petitioner to be duly elected upon the specific finding that, but for the corrupt practices of the successful candidate the

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petitioner would have got majority of the votes it cannot be said that by the discussion of the question relating to late commencement there was any error apparent on the face of the record which would entitle the High Court to interfere by a writ of certiorari. The tribunal was entitled to consider the question whether there was any violation of the statutory rules and orders which would entitle it to declare the election of the successful candidate void under S. 100 (2) (c) of the Representation of the People Act, 1951 and in doing so to take into consideration the circumstances and probabilities of the case. *T. C. Basappa* v. *T. Nagappa*, **A I R 1954 S C 440 (446) =1954 S C J 695.**

(503) *Art. 226 — Writ of certiorari— When can be issued.*

An inferior tribunal vested with powers to exercise judicial or quasi-judicial functions might have come to an erroneous conclusion, but where the conclusion is in respect of a matter which lies entirely within the jurisdiction of the tribunal and does not relate to anything collateral an erroneous decision upon which might affect his jurisdiction, and where records of the case do not disclose any error apparent on the face of the proceeding or any irregularity in the procedure adopted by the tribunal which goes contrary to the principles of natural justice, there are absolutely no grounds which would justify a superior Court in issuing a writ of certiorari for removal of an order or proceeding of such tribunal. In such a case High Court cannot exercise the powers of an appellate Court and correct what it considered to be an error in the decision of the tribunal. The position might have been different if he had omitted to decide a matter which he was bound to decide and in such cases a mandamus might legitimately issue commanding the authority to determine questions which it left undecided but no certiorari is available to quash a decision passed with jurisdiction by an inferior tribunal on the mere ground that such decision is erroneous. 1911 A C 179 *Rel. on. Parry & Co. Ltd.* v. *C. E. Association.*

AIR 1952 S C 179=1952 S C R 519 =1952 S C J 275.

(504) *Art. 226 — Writ of certiorari— Provision in State Act making decision of inferior tribunal final—Effect on power*

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to issue writs—Madras Shops and Establishments Act (LVI (56) of 1947), S. 51).

Whether or not 'certiorari' is or can be taken away by the provision like S. 51 of the Madras Act 56 of 1947 which makes the decision of the inferior tribunal final and incapable of being challenged in any Court of law, it is clear that in spite of such statutory provisions the superior Court is not absolutely deprived of the power to issue a writ, although it can do so only on the ground of either a manifest defect of jurisdiction in the tribunal that made the order or of a manifest fraud in the party procuring it. (1874) 5 P C 417, *Rel. on. Parry & Co. Ltd.* v. *C. E. Association.*

AIR 1952 S C 179=1952 S C R 519 =1952 S C J 275.

(505) *Art. 226—Mandamus — Practice and power of Courts—Court not to examine facts as Court of appeal.*

In mandamus petitions the High Court and the Supreme Court would not act as Court of appeal and consider and examine the facts for themselves. It was not the function of the Court of law to substitute their wisdom and discretion for that of the persons to whose judgment the matter in question was entrusted by the law. The University authorities acted honestly as reasonable and responsible men confronted with an urgent situation were entitled to act. This was decidedly not the sort of case in which a mandamus ought to issue. *Vice Chancellor, Utkal University* v. *S. K. Ghosh*

A I R 1954 S C 217 (219, 220) =1954 S C R 883 =1954 S C J 252.

(506) *Art. 226—Mandamus—Corporate body passing resolution without notice— Except one all members present — Question discussed not on agenda — Resolution unanimous—Not a fit case for issue of mandamus.*

Though an incorporated body like a University is a legal entity it has neither a living mind nor voice. It can only express its will in a formal way by a formal resolution and so can only act in its corporate capacity by resolutions properly considered, carried and duly recorded in the manner laid down by its constitution. If its rules require such resolutions to be moved and passed in a meeting called for the purpose, then every member of the body entitled to

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take part in the meeting must be given notice so that he can attend and express his views. Individual assents given separately cannot be regarded as equivalent to the assent of a meeting from the persons of which it is composed. Hence, an omission to give proper notice even to a single member in these circumstances would invalidate the meeting and that in turn would invalidate resolutions which purport to have been passed at it. But this is only when such inflexible rigidity is imposed by the incorporating constitution. The position is different when either by custom or by the nature of the body or by its constitution and rules, greater latitude and flexibility are permissible. Each case must be governed by its own facts and no universal rule can be laid down, also it may well be that in the same body certain things such as routine matters, can be disposed of more easily and with less formality than others. It all depends on the nature of the body and its rules. The substance is more important than the form and if there is substantial compliance with the spirit and substance of the law, an unessential defect in form will not be allowed to defeat what is otherwise a proper and valid resolution. The ordinary meeting of the University Syndicate had been called to consider certain matters. The question of the leakage of a question paper of certain examination was not on the agenda but the last item was "other matters, if any". The Vice Chancellor who presided over the meeting put the question before the committee. After carefully considering the question the members present unanimously passed a resolution that they were satisfied that there was leakage of the question paper that the examination in that particular subject be cancelled and that another examination in the subject be held. The syndicate consisted of twelve members. In the meeting there was a absentee. The resolution was unanimous. The absentee member was not told that the question of leakage would be one of the matters to be considered at the meeting. Some days afterwards another meeting was called. This time also the question of reconsideration of the previous decision was not on the agenda, but the Vice Chancellor brought the question before the meeting suo motu. This time also only eleven members were present

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but the absentee member was not the same person who was absent in the first meeting. By unanimous resolution the members refused to review its previous decision. Held that there was actual appearance without objection at meetings properly convened and that there was complete unanimity on both occasions, that the two resolutions were not invalid and that whatever might be thought about each taken separately, the defects, if any, were cured when the two were read together and regarded as a whole. *Vice Chancellor, Utkal University* v. *S. K. Ghosh.*

A I R 1954 S C 217 (219)
=1954 S C R 883
=1954 S C J 252.

(507) *Art. 226 — Mandamus — Threat of using coercive machinery under provisions declared ultra vires—Mandamus can issue — Another remedy onerous — It is not adequate alternative — (Sales Tax — C. P. and Berar Sales Tax Act (1947).*

Explanation II to section 2 (g) of the Act having been declared ultra vires, any imposition of sales tax under it is without the authority of law, and that being so a threat by the State of using the coercive machinery of the Act to realize it from the assessee is a sufficient infringement of his fundamental right under Art. 19 (1) and he is clearly entitled to relief under Art. 226 of the Constitution.

The contention that because a remedy under the impugned Act is available to the assessee, he is disentitled to relief under Art. 226 stands negatived by the decision in A. I. R. 1953 S C 252, of this Court in the 'State of Bombay v. The United Motors (India) Ltd.'. The principle that a Court will not issue a prerogative writ when an adequate alternative remedy was available does not apply where a party has come to the Court with an allegation that his fundamental right had been infringed and sought relief under Art. 226. Moreover, since the remedy provided by the C. P. and Berar Sales Tax Act is of an onerous and burdensome character and before the assessee can avail of it he has to deposit the whole amount of the tax, such a provision can hardly be described as an adequate alternative remedy. *Himmatlal Harilal Mehta* v. *State of Madhya Pradesh.*

A I R 1954 S C 403 (405, 406)
= 1954 S C J 445.

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(508) *Art. 226 — Writ of Mandamus— Issue of — Claim for dearness allowance by Government Servants — (Fundamental Rules, R. 44).*

Mandamus can be granted only when there is in the applicant a right to compel the performance of some duty cast on the opponent. Rule 44 of the Fundamental Rules confers no right on the Government Servants to the grant of dearness allowance; it imposes no duty on the State to grant it. It merely confers a power on the State to grant compassionate allowance at its own discretion. No Mandamus can, therefore, issue to compel the exercise of such a power. Nor, indeed, could any other writ or direction be issued in respect of it, as there is no right in the applicant which is capable of being protected or enforced. *The State of Madhya Pradesh* v. *G. C. Mandawar*,

A. I. R. 1954 S C 493 (495) =1954 S C J 503.

(509) *Art. 226 — Writs of prohibition and certiorari—Difference between.*

There is one fundamental distinction between the two writs, namely, a writ of prohibition and a writ of certiorari. They are issued at different stages of the proceedings. When an inferior court takes up for hearing a matter over which it has no jurisdiction, the person against whom the proceedings are taken can move the superior Court for a writ of prohibition, and on that, an order will issue forbidding the inferior Court from continuing the proceedings. On the other hand, if the Court hears that cause or matter and gives a decision, the party aggrieved would have to move the superior Court for a writ of certiorari, and on that, an order will be made quashing the decision on the ground of want of jurisdiction. Broadly speaking a writ of prohibition will lie when the proceedings are to any extent pending and a writ of certiorari for quashing after they have terminated in a final decision. *Hari Vishnu* v. *Ahmad Ishaque*,

A I R 1955 S C 233.

(510) *Art. 227 — Arts. 227 and 226.*

While in a certiorari under Art. 226 the High Court can only annul the decision of the Tribunal, it can, under Art. 227, do that, and also issue further directions in the matter. *Hari Visnnu* v. *Ahmad Ishaque*,

A I R 1955 S C 233.

(511) *Art. 227 — Superintendence over Election Tribunals.*

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The Election Tribunals are subject to the superintendence of the High Courts under Art. 227 of the Constitution. That superintendence is both judicial and administrative. *Hari Vishnu* v. *Ahmad Ishaque*,

A I R 1955 S C 233.

(512) *Arts. 227, 241—Rent Controller and District Judge acting under Rent Act — Jurisdiction of Judicial Commissioner — (Houses and Rents—East Punjab Urban Rent Restriction Act (3 of 49), Ss. 13, 15).*

The words "in relation to which" in Art. 227 obviously qualify the word "territories" and not the words "Courts and Tribunals." The Court of the Judicial Commissioner of Himachal Pradesh exercises jurisdiction in relation to the whole of the territories of Himachal Pradesh. The Rent Controller and the District Judge exercising Jurisdiction under the East Punjab Urban Rent Restriction Act, 1949, as extended to Himachal Pradesh are certainly Tribunals, if not courts, and they function within the territories of Himachal Pradesh. Therefore, Article 227 (1) read with Article 241 confers on the Court of the Judicial Commissioner power of superintendence over such Tribunals. *Waryam Singh* v. *Amarnath*,

A I R 1954 S C 215 (216, 217) =1954 S C R 565=1954 S C J 290.

(513) *Art. 227 — Nature of superintendence under.*

The contention based on Clause (2) of Art. 227 that the article only confers on the High Court "administrative" superintendence over the Subordinate Courts and Tribunals cannot be accepted because Clause (2) is expressed to be without prejudice to the generality of the provisions in Clause (1). The material part of Article 227 substantially reproduces the provisions of section 107 of the Government of India Act, 1915 except that the power of superintendence has been extended by the Article also to Tribunals. Further, the preponderance of judicial opinion in India was that section 107 which was similar in terms to section 15 of the High Courts Act, 1861, gave a power of Judicial superintendence to the High Court apart from and independently of the provisions of other laws conferring revisional jurisdiction on the High Courts. Section 107 was reproduced as S. 224 in the Government of India Act 1935 with a new sub-section (2) which was omitted when

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S. 224 was reproduced with some modifications as Art. 224 of the Constitution. This significant omission has been regarded by all High Courts in India as having restored to the High Court the power of judicial superintendence it had under Section 15 of the High Courts Act, 1861 and section 107 of the Government of India Act, 1915. *Waryam Singh* v. *Amarnath*

A I R 1954 S C 215 (217) =1954 S C R 565=1954 S C J 290.

(514) *Art. 227 — Power of superintendence under — Exercise of — (Houses and Rents — East Punjab Urban Rent Restriction Act (3 of 1949) S. 13 (2)).*

The power of superintendence conferred by Art. 227 is to be exercised most sparingly and only in appropriate cases in order to keep the Subordinate Courts within the bounds of their authority and not for correcting mere errors. A I R 1951 Cal 193 (S B) Ref. Thus where the lower Courts realised the legal position but in effect declined to do what was by Section 13 (2) (i) of the East Punjab Urban Rent Restriction Act, 1949 incumbent on them to do and thereby refused to exercise jurisdiction vested in them by law, it was a case which called for an interference by the Court of the Judicial Commissioner under this Article and it acted quite properly in doing so. *Waryam Singh* v. *Amarnath*

A I R 1954 S C 215 (217) =1954 S C R 565=1954 S C J 290.

(515) *Art. 239—Executive head of Part 'C' State — Position and status of President—(Government of Part 'C' States Act (49 of 1951), S. 38 (2)).*

The President who is the executive head of the Part C States does not function as the executive head of the Central Government, but as the head of the State under powers specifically vested in him under Art. 239. The authority conferred under Art. 239 to administer Part C States has not the effect of converting those States into the Central Government. Under Art. 239, the President occupies in regard to Part C States, a position analogous to that of a Governor in Part A States and of a Rajpramukh in Part B States. Though the Part C States are centrally administered under the provisions of Art. 239, they do not cease to be states and become merged with the Central

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Government. *Satya Dev Bushahri* v. *Padam Dev*,

A I R 1954 S C 587 (591) =1954 S C J 764.

(515-A) **Article 245.**

See also:

(1) A I R 1954 S C 465 under "Essential Supplies" (Temporary Powers) Act, 1946.
(2) A I R 1954 S C 158 under Income-tax Act (1922), S. 2 (14-A) as amended by Finance Act, 1950.
(3) A I R 1952 S C 252 under U. P. Zamindari Abolition and Land Reforms Act.
(4) A I R 1952 S C 123 under Public Safety.
(5) A I R 1952 S C 52 under U. P. Zamindari Abolition and Land Reforms Act.

(516) *Art. 245 — Minimum Wages Act (1948), S. 27—Legislative policy of the Act —Provision in S. 27 deals with subsidiary power — S. 27 is valid.*

The legislative policy is apparent on the face of the Minimum Wages Act, 1948. What it aims at, is the statutory fixation of minimum wages with a view to obviate the chance of exploitation of labour. The Legislature undoubtedly intended to apply this Act not to all industries but to those industries only where by reason of unorganized labour or want of proper arrangements for effective regulation of wages or for other causes the wages of labourers in a particular industry were very low. It is with an eye to these facts that the list of trades has been drawn up in the schedule attached to the Act but the list is not an exhaustive one and it is the policy of the Legislature not to lay down at once and for all time, to which industries the Act should be applied.

Conditions of labour vary under different circumstances and from State to State and the expediency of including a particular trade or industry within the Schedule depends upon a variety of facts which are by no means uniform and which can best be ascertained by the person who is placed in charge of the administration of a particular State. It is to carry out effectively the purpose of this enactment that power has been given to the "appropriate Government" to decide, with reference to local conditions, whether it is desirable that minimum wages

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should be fixed in regard to a particular trade or industry which is not already included in the list.

Hence, in enacting S. 27 the Legislature has not in any way stripped itself of its essential powers or assigned to the administrative authority anything but an accessory or subordinate power which was deemed necessary to carry out the purpose and the policy of the Act. Section 27, therefore, is neither illegal nor 'ultra vires.' *Edward Mill Co.* v. *State of Ajmer*,

A I R 1955 S C 25.

(517) *Art. 245 — Delegation of legislative powers — Extent of — Validity of S. 3 (1) (f) of Bihar and Orissa Act 1 of 1915 and Notification of 23-4-51 (Municipalities)—Patna Administration Act (1 of 1951), S. 53 (1) (f).*

An executive authority can be authorised to modify either existing or future laws but not in any essential feature. Exactly what constitutes an essential feature cannot be enunciated in general terms. But this much is clear that it cannot include a change of policy.

As a part of an Act can be extended by an executive authority it follows that a section or sections also can be picked out and applied. Also for the same reason that the whole or a part of an Act can be modified, it follows that a section also can be modified. But when a section of an Act is selected for application, whether it is modified or not, it must be done so as not to effect any change of policy, or any essential change in the Act regarded as a whole.

Subject to the above limitation, S. 3 (1) (f) of the Bihar and Orissa Act 1 of 1915 as amended in 1928 is *intra vires*, that is to say, any section or sections of the Bihar and Orissa Municipal Act of 1922 can be picked and applied to "Patna" provided that does not effect any essential change in the Act or alter its policy.

The Notification of 23-4-1951 extending S. 104 of the Bihar and Orissa Municipal Act, 1922, to the Patna village area, however, effects a radical change in the policy of the Act. The action of the Governor in subjecting the residents of the Patna village area to municipal taxation without observing the formalities imposed by Ss. 4, 5 and 6 of the Bihar and Orissa Municipal Act of 1922, cuts across one of its essential features touching a matter of policy. Therefore, the

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Notification travels beyond the authority which S. 3 (1) (f) confers and consequently it is *ultra vires*. *Rajnarain Singh* v. *Chairman, Patna Administration Committee*,

A I R 1954 S C 569 (574, 575).
=1954 S C J 661.

(518) *Arts. 245 and 13 — Constitutionality of legislation—Duty of Court—(Constitutional Law* — Ultra vires — *Duty of Court).*

In order to decide whether a particular legislation is unconstitutional as offending the provisions of the Constitution it is necessary to examine with some strictness the substance of the legislation for the purpose of determining what it is that the legislature has really done; the Court, when such questions arise, is not overpersuaded by the mere appearance of the legislation. In relation to constitutional prohibitions binding a legislature it is clear that the legislature cannot disobey the prohibitions merely by employing indirect method of achieving exactly the same result. Therefore, in all such cases the Court has to look behind the names, forms and appearances to discover the true character and nature of the legislation. *Dwarkadas Sriniwas* v. *Sholapur Spinning & Weaving Co.*,

A I R 1954 S C 119
=1954 S C R 674=1954 S C J 175.

(519) *Arts. 245, 246—Colourable legislation—(Civil P. C. (1908), Pre.).*

The scope and the meaning of doctrine of colourable legislation examined—If the Constitution of a State distributes the legislative powers amongst different bodies which have to act within their respective spheres marked out by specific legislative entries, or if there are limitations on the legislative authority in the shape of fundamental rights, questions do arise as to whether the legislature in a particular case has or has not, in respect to the subject-matter of the statute or in the method of enacting it, transgressed the limits of its constitutional powers. Such transgression may be patent, manifest or direct, but it may also be disguised, covert and indirect and it is to this latter class of cases that the expression 'colourable legislation' has been applied in certain judicial pronouncements. *Case law Rel. on. K. C. G. Narayan Deo* v. *State of Orissa*,

A I R 1953 S C 375
=1954 S C R 1=1953 S C J 592.

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(520) *Arts. 245, 246, Sch. 7, List 3, Entry 42 — Orissa Estates Abolition Act (1 of 1952), S. 37—Validity.*

Section 37 contains the legislative provision regarding the form and the manner in which the compensation for acquired properties is to be given and as such it comes within the clear language of Entry 42 of List III, Sch. VII of the Constitution. It is not a legislation on something which is non-existent or unrelated to facts. It cannot also be seriously contended that what S. 37 provides for, is not the giving of compensation but of negativing the right to compensation. The validity of this provision cannot be challenged on the ground that it is a piece of colourable legislation. *K. C. G. Narayan Deo* v. *State of Orissa*,

A I R 1953 S C 375
=1954 S C R 1=1953 S C J 592.

(521) *Arts. 245 (1) and 246 — Legislative power of Parliament, how far limited.*

Per *Das J.* — By Art. 245 (1) the legislative power of the Parliament is definitely made "subject to the provisions of this constitution." A perusal of Art. 19 makes it abundantly clear that none of the seven rights enumerated in cl. (1) of that Article is an absolute right, for, each of these rights is liable to be curtailed by laws made or to be made by the state to the extent mentioned in the several Cls. (2) to (6) of that Article.

Those clauses save the power of the State to make laws imposing certain specified restrictions on the several rights. The unlimited legislative power given by Art. 246 read with the different legislative lists in Sch. 7 is cut down by the provisions of Art. 19 and all laws made by the state with respect to these rights must, in order to be valid, observe these limitations. Whether any law has in fact transgressed these limitations is to be ascertained by the Court and if in its view the restrictions imposed by the law are greater than what is applicable by Cls. (2) to (6) of Art. 19 whichever is applicable, the Court will declare the same to be unconstitutional and, therefore, void under Art. 13. *Gopalan* v. *State of Madras*, **A I R 1950 S C 27**
=1950 S C J 174=1950 S C R 88.

(521-A) Art. 246.

See also A I R 1953 S C 91 under Art. 385.

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(522) Art. 246—The constitutionality of a Statute passed by a competent legislature cannot be challenged on the ground that the law made is not reasonable or just. *State of Bihar* v. *Kameshwar Singh*,

A I R 1952 S C 252
=1952 S C R 889
=1952 S C J 354.

(523) *Art. 246 — Entries in Lists of Sch. 7 do not impose implied restrictions on legislative powers.*

(Per *Patanjali Sastri, C. J.*):—The entries in the lists of the seventh schedule are designed to define and delimit the respective areas of legislative competence of the Union and State Legislatures, and such context is hardly appropriate for the imposition of the implied restriction on the exercise of legislative powers, which are ordinarily matters for positive enactment in the body of the Constitution.

The entries in the lists are merely legislative heads and are of an enabling character. Duty to exercise legislative power and in a particular manner cannot be read into a mere head of legislation, *State of Bihar* v. *Kameshwar Singh*,

A I R 1952 S C 252
=1952 S C R 889
=1952 S C J 354.

(524) *Arts. 246 and 13 — Part of law void—Effect.*

Per *Mahajan and Aiyar JJ.* : — Where some provisions of an Act are 'ultra vires' the question whether the Statute as a whole must be pronounced to be 'ultra vires', depends upon the question whether what remains is so inextricably bound up with the part declared invalid that what remains cannot independently survive, or, as it has sometimes been put, whether on a fair review of the whole matter it can be assumed that the legislature would have enacted at all that which survives without enacting the part that is 'ultra vires' if the offending provisions of the Act are not so inextricably bound up with the part that is valid, the whole act cannot be pronounced to be 'ultra vires'. *State of Bihar* v. *Kameshwar Singh*, **A I R 1952 S C 252**
=1952 S C R 889
=1952 S C J 354.

(525) *Art. 246 — Colourable piece of legislation—Validity.*

(Per *Mahajan J.*): — Legislation ostensibly under one or other of the powers

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conferred by the Constitution but in truth and fact not falling within the content of that power is merely colourably constituted but is really not so. (1878) 3 A C 1090, (1862) 7 A C 829, *Rel. on*: (1399) A C 626, *Ref.*

Per *Mukherjee J.*: — When a legislature has a limited or qualified power and has got to act within a sphere circumscribed by legislative entries, the question whether in purporting to act under these entries, it has, in substance, gone beyond them and has done certain things which cannot be accomplished within the scope of these entries, is, really a question affecting the competency of the legislature, in such cases, although the legislation purports to have been enacted under a particular entry, if it is really outside it, it would be void.

Per *Das J.*: — The failure to comply with the constitutional condition for the exercise of legislative power may be overt or it may be covert. When it is overt, we say the law is obviously bad for non-compliance with the requirements of the Constitution, that is to say, the law is 'ultra vires'. When, however, the non-compliance is covert, we say that it is a fraud on the Constitution, the fraud complained of being that the legislature pretends to act within its power while in fact it is not so doing. *State of Bihar* v. *Kameshwar Singh*,

A I R 1952 S C 252
=1952 S C R 889
=1952 S C J 354.

(526) *Art. 254 — Rule of implied repeal.*

On a question under Art. 254 (1) whether an Act of Parliament prevails against a law of the State, no question of repeal arises: but the principle on which the rule of implied repeal rests, namely, that if the subject-matter of the later legislation is identical with that of the earlier, so that they cannot both stand together, then the earlier is repealed by the later enactment, will be equally applicable to a question under Art. 254 (2) when the further legislation by Parliament is in respect of the same matter as that of the State Law. Hence S. 2 of Bombay Act No. 36 of 1947 cannot prevail as against S. 7 of the Essential Supplies (Temporary Powers) Act (24 of 1946) as amended by Act No. 52 of 1950. *Zaverbhai Amaidas* v. *State of Bombay*,

A I R 1954 S C 752 (758)
=1954 S C J 851.

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(527) *Art. 254 (2)—Legislation by Parliament and State "in respect of the same matter"—Rule of Constitution.*

Section 7 of the Essential Supplies (Temporary Powers) Act, 1946, is a comprehensive code covering the entire field of punishment for offences under the Act, graded according to the commodities and to the character of the offence. The subject of enhanced punishment that is dealt with in the Bombay Essential Supplies (Temporary Powers) and the Essential Commodities and Cattle (Control) (Enhancement of Penalties) Act, 1946 (as amended by Act 52 of 1950), the same being limited to the case of hoarding of foodgrains. Hence S. 7 of the Central Act is a legislation in respect of the same matter as Bombay Act, No. 36 of 1947.

The question of punishment for contravention of orders under the Essential Supplies (Temporary Powers) Act, both under Bombay Act No. 36 of 1947 and under Central Act No. 52 of 1950, constitutes a single subject-matter and cannot be split up. On this principle rests the rule of construction relating to statutes that "when the punishment or penalty is altered in degree but not in kind, the latter provision would be considered as superseding the earlier one." *Zaverbhai Amiadas* v. *State of Bombay*,

A I R 1954 S C 752 (757, 758)
=1954 S C J 851.

(528) *Art. 254 (2)—Principle embodied in.*

The important thing to consider with reference to Art. 254 (2) is whether the Legislation is "in respect of the same matter". If the later legislation deals not with the matters which formed the subject of the earlier legislation but with the other and distinct matters though of a cognate and allied character, then Art. 254 (2) will have no application. The principle embodied in S. 107 (2), Government of India Act, 1935, and Art. 254 (2), Constitution of India, is that when there is legislation covering the same ground both by the Centre and by the Province, both of them being competent to enact the same, the law of the Centre should prevail over that of the State. *Zaverbhai Amaidas* v. *State of Bombay*,

A I R 1954 S C 752 (757)
=1954 S C J 851.

(529) *Art. 254 (2) — Government of India Act (1935), S. 107 (2) — Power of*

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Central Legislature or Parliament to repeal directly Provincial or State Legislation enacted with respect to same matter.

Under S. 107 (2), Government of India Act, 1935, the position was that though a law enacted by the Central Legislature and within its competence would override Provincial legislation covering the same field, the Central Legislature had no authority conferred upon it under the Government of India Act to enact a statute repealing directly any Provincial statute.

Article 254 (2), Constitution of India, is in substance a reproduction of S. 107 (2), Government of India Act, 1935. But by the proviso to Art. 254 (2) the Constitution has enlarged the powers of Parliament, and under that proviso, Parliament can do what the Central Legislature could not under S. 107 (2) of the Government of India Act, and enact a law adding to, amending, varying or repealing a law of the State, when it relates to a matter mentioned in the Concurrent List. The position then is that under the Constitution, Parliament can acting under the proviso to Art. 254 (2), repeal a State law. But where it does not expressly do so, even then, the State law will be void under that provision if it conflicts with a later "law with respect to the same matter" that may be enacted by Parliament. *Zaverbhai Amaidas* v. *State of Bombay*,

A I R 1954 S C 752 (756, 757)
=1954 S C J 851.

(530) *Arts. 265, 27, 110 (a) and Sch. VII, List 3, Entry 47—Distinction between tax and fee.*

A tax is in the nature of a compulsory exaction of money by a public authority for public purposes, the payment of which is enforced by law. The other characteristic of a tax is, that the imposition is made for public purpose to meet the general expenses of the State without reference to any special advantage to be conferred upon the payers of the tax. Thus, although a tax may be levied upon particular classes of persons or particular kinds of property, it is imposed not to confer any special benefit upon individual persons and the collections are all merged in the general revenue of the State to be applied for general public purposes. Tax is a common burden and the only return which the tax-payer gets is participation in the common benefits of the State.

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Fees are payments primarily in the public interest, but for some special service rendered or some special work done for the benefit of those from whom the payments are demanded. Thus in fees there is always an element of 'quid pro quo' which is absent in a tax. In order that the collections made by the Government can rank as fees there must be correlation between the levy imposed and the expenses incurred by the State for the purpose of rendering such services. Thus two elements are essential in order that a payment may be regarded as a fee. In the first place, it must be levied in consideration of certain services which the individuals accepted either willingly or unwillingly and in the second place, the amount collected must be ear-marked to meet the expenses of rendering these services and must not go to the general revenue of the State to be spent for general public purposes.

However, too much stress should not be laid on the presence or absence of what has been called the 'coercive' element. It is not correct to say that as distinguished from taxation which is compulsory payment, the payment of fees is always voluntary, it being a matter of choice with individuals either to accept the service or not for which fees are to be paid. A I R 1954 S C 282, *Reiterated;* AIR 1953 Bom 242, *Appr. Rati Lal* v. *State of Bombay*, **AIR 1954 S C 388**
=1954 S C J 480.

(531) *Art. 277 — Finance Act (1950), S. 13 Proviso—Validity.*

While Art. 277 undoubtedly authorises the continued levy of taxes lawfully levied by the Government of the State before commencement of the Constitution and their application to the same purposes as before, even after the Constitution came into force, there is nothing in the Article to warrant any implication that such taxes should continue to be levied, assessed and collected by the same State authorities as before the Constitution. There is nothing in Art. 277 of the Constitution, to preclude parliament making a law providing for the levy and collection of income-tax and super tax under the Mysore Act through authorities appointed under the Indian Income-tax Act. Proviso to S. 13 of the Finance Act is therefore not *ultra vires. D. R. Mathavakrishinaijah* v. *Income-tax Officer, Bangalore*,

A I R 1954 S C 163.

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(532) *Art. 286 (1), Expl.* —"*Consumption.*"

Per *Bose J.*—In its economic sense "consumption" is just the use which a purchaser chooses to make of the goods purchased for his own purposes. He does not have to destroy them nor does he have to diminish their value or utility. A man who purchases a valuable piece of sculpture or painting for preservation in a national museum does not destroy it nor does he use it himself except for the purposes of presenting it to the museum. But he is a consumer. In the same way, a man who purchases goods for use in his business so that his businsss can be carried on by the constant feeding of a stream uses the goods and therefore "consumes" them even though he does not keep them himself. It thus means the usual use made of an article for the purposes of trade and commerce.

Per *Bhagwati J.* — A dealer who deals with the goods after purchasing the same does not consume the goods. He deals with or disposes of the same in the ordinary course of trade and he is a dealer or a trader in those goods. He is not a consumer of those goods. *State of Bombay* v. *United Motors Ltd.*, **A I R 1953 S C 252 =1953 S C R 1069=1953 S C J 373.**

(533) *Art. 286 (1), Expl.* — *Scope of Explanation. A I R 1953 S C 252,* Dissented from.

Per *Das J.* — The Explanation to Cl. (1) (a) only explains what is an outside sale or purchase, for, by saying that a particular sale or purchase is to be deemed to take place in particular State it only indicates that it is to be deemed to take place outside all other States so as to attract the ban of Cl. (1) (a) and thereby take away the taxing power of those other States with respect to such sale or purchase. The explanation does not operate as an exception or a proviso but only explains sub-cl. (a). The fiction created by the Explanation is only for the purposes of sub-cl (a), so that sales or purchases of the kind which fall within the explanation get the benefit of the ban imposed by sub-cl. (a). Therefore, the purpose of the explanation read with sub-cl. (a) is only to take away the power of taxation of those States in relation to those sales or purchases which are to be deemed to be outside sales or purchases. Its purpose is not and, indeed, it does not purport to confer any taxing power on any state, and it cannot be resorted to

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for any such extraneous or collateral purpose. It does not convert an inter-State sale or purchase into an intra-state sale for any purpose other than the limited purpose of of sub-cl. (a). *State of Travancore-Cochin* v. *S. V. C. Factory,*

A I R 1953 S C 333=1954 S C R 53 1953 S C J 471.

(534) *Art. 286 (1) (a), Expl. and (2), and Sch. VII, List 2, Entry 54—Tax on sale or purchase of goods.*

Per *Patanjali Sastri C. J. (with him Mukherjea and Gulam Hasan JJ.)* — Clause (1) (a) of Art. 286 prohibits the taxation of all sales or purchases which take place outside the State, but a localised sale is a troublesome concept, for, a sale is a composite transaction involving as it does several elements such as agreement to sell, transfer of ownership, payment of the price, delivery of the goods and so forth, which may take place at different places. It is difficult to say that any one of the ingredients mentioned above is more essential to a sale or purchase than the others. To solve the difficulty an easily applicable test for determining what is an outside sale had to be formulated, and that is what the Explanation is intended to do.

The Explanation provides by means of a legal fiction that the State in which the goods sold or purchased are actually delivered for consumption therein is the State in which the sale or purchase is to be considered to have taken place, notwithstanding the property in such goods passed in another State. The test of sufficient territorial nexus is thus replaced by a simpler and more easily workable test. Are the goods actually delivered in the taxing State, as a direct result of a sale or purchase, for the purpose of consumption therein ? Then, such sale or purchase shall be deemed to have taken place in that State and outside all other States. The latter States are prohibited from taxing the sale or purchase; the former alone is left free to do so. Multiple taxation of the same transaction by different States is also thus avoided.

State of Bombay v. *United Motors Ltd.*,

A I R 1953 S C 252=1953 S C R 1069 =1953 S C J 373.

(535) *Art. 286 (1) (b)* — *Integrated activities in relation to sale.*

Per *Majority.* — The phrase "integrated activities" is used in A. I. R. 1952 S. C.

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366 to denote that "such a sale" (i. e., a sale which occasions the export) "cannot be dissociated from the export without which it cannot be effectuated, *and the sale and the resultant export form parts of a single* transaction." It is in that sense that the two activities—the sale and the export—are said to be integrated. It is not correct to speak of a purchase for export as an activity so integrated with the exportation that the former could be regarded as done "in the course of" the latter.

Per *Das J.*—"By adopting this principle of integrated activities in A. I. R. 1952 S. C. 366 we have included the agreement for sale to, or purchase from, the foreign merchant as taking place within the period connoted by that phrase. The agreement for sale or purchase, which occasions the export or import as the case may be, is obviously in point of time, anterior to the actual and physical handing over of the goods to the carrier for taking the goods out of the country or for bringing them into the country as the case may be, but, nevertheless, such a sale or purchase has been held to have taken place "in the course of" export or import and as such exempt from taxation by the States." *State of Travancore-Cochin* v. *S. V. C. Factory*,

A I R 1953 S C 333=1954 S C R 53 1953 S C J 471.

(536) *Art. 286 (1) (b) — Sale in the course of import or export.*

Per *Majority.*—With respect to the scope of Art. 286 (1) (b) the following conclusions may be summed up:

(1) Sales by export and purchases by import fall within the exemption under Art. 286 (1) (b): A. I. R. 1952 S. C. 366, *Foll.*

(2) Purchases in the State by the exporter for the purpose of export as well as sales in the State by the importer after the goods have crossed the customs frontier are not within the exemption; and

(3) Sales in the State by the exporter or importer by transfer of shipping documents while the goods are beyond the customs frontier are within the exemption, assuming that the State power of taxation extends to such transactions.

Per *Das J.*—A sale or purchase "in the course of" import or export within the

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meaning of Art. 286 (1) (b) includes (i) a sale or purchase which itself occasions the import or export, (ii) a sale or purchase which takes place while the goods are on the high seas on their import or export journey and (iii) the last purchase by the exporter with a view to export and the first sale by the importer to a dealer after the arrival of the imported goods. If a sale or purchase takes place within a State, either under the general law or by reason of the Explanation, then, if it takes place in the course of import or export as explained above, no State, not even the State within which such sale or purchase takes place can tax it by reason of Cl. (1) (b). *State of Travancore-Cochin* v. *S. V. C. Factory*, **A I R 1953 S C 333 =1954 S C R 53=1953 S C J 471.**

(537) *Art. 286 (1) (b) — "Import into" and "export out of" — (Words and Phrases).*

The words "import into" and "export out of" in the context of cl. (1) (b) do not mean the article or commodity imported or exported. The reference to "the goods" and to "the territory of India" makes it clear that the words "export out of" "import into" mean the exportation out of the country and importation into the country respectively. *State of Travancore-Cochin* v. *S. V. C. Factory*, **A I R 1953 S C 333 =1954 S C R 53=1953 S C J 471.**

(538) *Art. 286 (1) (b) — "In the course of"—(Words and Phrases).*

Per *Majority.*—The word "course" etymologically denotes movement from one point to another, and the expression "in the course of" not only implies a period of time during which the movement is in progress but postulates also a connected relation. A sale in the course of export out of the country should be understood in the context of Cl. (1) (b) as meaning a sale taking place not only during the activities directed to the end of exportation of the goods out of the country but also as part of or connected with such activities. The time factor alone is not determinative: (1877) 4 Ch. D. 685, *Rel. on.*

Per *Das J.*—The word "course" conveys the idea of a gradual and continuous flow, an advance, a journey, a passage or progress from one place to another. Etymologically it means and implies motion, a forward movement. The phrase "in the course of" clearly has reference to a period of time

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during which the movement is in progress. *State of Travancore-Cochin* v. *S. V. C. Factory*, **A I R 1953 S C 333 =1954 S C R 53=1953 S C J 471.**

(539) *Art. 286 (1) (b) — Scope and meaning of.*

Whatever else may or may not fall within Art. 286 (1) (b), sales and purchases which themselves occasion the export or the import of the goods, as the case may be, out of or into the territory of India, come within the exemption under Art. 286 (1) (b). Export sales of commodities to foreign buyers on c. i. f. or f. o. b. terms, therefore, fall within the scope of exemption under Art. 286 (1) (b). A sale by export involves a series of integrated activities commencing from the agreement of sale with a foreign buyer and ending with the delivery of the goods to a common carrier for transport out of the country by land or sea. Such a a sale cannot be dissociated from the export without which it cannot be effectuated, and the sale and resultant export form parts of a single transaction. Of these two integrated activities, which together constitute an export sale, whichever first occurs can well be regarded as taking place in the course of the other. Even where the property in the goods passes to the foreign buyers and the sales are thus completed within the State before the goods commence their journey, the sales must, nevertheless, be regarded as having taken place in the course of the export and are, therefore, exempt under Art. 286 (1) (b) : A. I. R. 1952 Trav.Co. 83, *Affirmed.*

Much help cannot be derived from the American decisions in the solution of the problems arising under this Article. *State of Travancore-Cochin* v. *Bombay Co. Ltd.*, **A I R 1952 S C 366=1952 S C R 1112 =1952 S C J 527.**

(540) *Art. 286 (2) — "In the course of inter-State trade."*

The sale by a trader in one State to a user in another would be a sale "in the course of inter-State trade" according to the natural meaning of those words, and there is no reason for importing the restriction that the transaction should be one between two traders only. *State of Bombay* v. *United Motors Ltd.*, **A I R 1953 S C 252=1953 S C R 1069 =1953 S C J 373.**

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(541) *Art. 286 and Sch. VII, List 2 Entry 54—Tax on sale.*

Per *Das J.* — The State Legislatures, under Entry 54 of the State List, have power to make laws with respect to tax on the sale or purchase of goods. On this general power, Art. 286 places four restrictions, namely, that no law of a State shall impose or authorise the imposition of tax on the sale or purchase of goods when such sale or purchase takes place (1) outside the State, (2) in the course of import or export, (3) in the course of inter-State trade and commerce and (4) in respect of essential commodities. *State of Travancore-Cochin* v. *S. V. C. Factory* **A I R 1953 S C 333 = 1954 S C R 53 = 1953 S C J 471.**

(542) *Art. 286 and Sch. VII, List 2, Entry 54, Tax on sale by State.*

Per *S. R. Das J.*—If a sale or purchase takes place out-side a State, either under the general law or by virtue of the fiction created by the Explanation then that State cannot, under Cl. (1) (a), tax such sale or purchase. If a sale or purchase takes place within a state, either under the general law or by reason of the Explanation, then if such a sale or purchase takes place 'in the course of' inter-state trade and commerce, no State, not even the State where the sale or purchase takes place as afore-said can tax it by reason of Cl. (2) unless and until Parliament by law provides otherwise *State of Travaneore-Cochin* v. *S. V. C. Factory*, **A I R 1953 S C 333 = 1954 S C R 53 = 1953 S C J 471.**

(543) *Art. 286 (3)—Article contemplates post Constitution Act—(Sales Tax, Pepsu General Sales Tax Ordinance (33 of 2006) —Essential Goods — Declaration and Regulation of Tax on Sale or Purchase) Act (52 of 1952) S. 3).*

Section 3 of the Central Act 52 of 1952 is in line with Art. 286 (3) and there is no inconsistency between that section and the relevant provision of the constitution.

Pepsu General Sales Tax Ordinance (33 of 2006) which is an existing law has been continued by Art. 372 amended by any competent legislative authority. It is quite clear that S. 3 of Act 52 of 1952 does

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not affect the Ordinance, for the Ordinance was not made after the commencement of that Act. Perusal of Cl. (3) of Art. 236 on the Constitution will at a glance indicate that that clause contemplates a post Constitution law, for, it must be a law made by a "legislature of a State which must refer to the legislature of a State created by the Constitution. Further, it contemplates a law which can be but has not been reserved for consideration of the President and has not received his assent. This provision clearly points to post-Constitution law for there can be no question of an existing law by Art. 372 being reserved for the consideration of the President for receiving his assent.

No question therefore arises whether the Ordinance has become void since the commencement of the Constitution. *Suleman Issa* v. *State of Bombay*,

A I R 1954 S C 311 (312)
= 1954 S C R 976
= 1954 S C J 387.

(544) *Art. 299 (1)—Scope — Contract Act, S. 230 (3).*

The provisions of Art. 299 (1) were not inserted for the sake of mere form. They are there to safeguard Government against unauthorised contracts. If in fact a contract is unauthorised or in excess of authority it is right that Government should be safeguarded. On the other hand, an officer entering into a contract on behalf of Government can always safeguard himself by having recourse to the proper form. In between is a large class of contracts probably by far the greatest in numbers which though authorised are for one reason or other not in proper form. It is only right that an innocent contracting party should not suffer because of this and if there is no other defect or objection Government will always accept the responsibility.

Held that the Chairman of the Board of Administration acted on behalf of the Union Government and his authority to contract in that capacity was not questioned. There can equally be no doubt that both sides acted in the belief and on the assumption, which was also the fact that the goods were intended for Government purposes, namely amenities for the troops. The only law was that that the contracts were not in proper form and so because of

this purely technical defect, the principal could not have been sued. But that is just the kind of case that S. 230 (3) Contract Act is designed to meet.

It would be disastrous to hold that the hundreds of Government Officers who have daily to enter into a variety of contracts often of a petty nature, and sometimes in an emergency, cannot contract orally or through correspondence and that every petty contract must be effected by a ponderous legal document couched in a particular form.

It may be that Government will not be bound by the contract in that case, but that is a very different thing from saying that the contracts as such are void and of no effect. It only means that the principal cannot be sued but there would be nothing to prevent ratification especially if that was for the benefit of Government. When a Government Officer acts in excess of authority Government is bound if it ratifies the excess. The contracts in question were not void simply because the Union Government could not have been sued on them by reason of Art. 299 (1). *Chatturbhuj Vithaldas* v. *Moreswar Parasharan*,

A I R 1954 S C 236 (243)
= 1954 S C R 817.

(545) *Arts. 301 and 19 (1) (g) — U. P. State Road Transport Act (2 of 1951).*

Whether conflicts with the guarantee of freedom of inter-state and intra-state trade, commerce and intercourse provided under Art. 301 ?

(Quære) Points that could be raised and the different views that are possible in this respect indicated. *Saghir Ahmed* v. *State of U. P.*,

A I R 1954 S C 728 (741-742)
= 1954 S C J 819.

(546) *Arts. 301 and 304 — State-power of imposing tax on goods imported.*

The principle of freedom of inter-State trade and commerce declared in Art. 301 is expressly subordinated to the State power of taking goods imported from sister States provided only no discrimination is made in favour of similar goods of local origin. Thus the States in India have full power of imposing what in American State Legislation

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is called the use tax, gross receipts tax, etc. not to speak of the familiar property tax, subject only to the condition that such tax is imposed on all goods of the same kind produced or manufactured in the taxing State, although such taxation is undoubtedly calculated to fetter inter-State trade and commerce. In other words, the commercial unity of India is made to give way before the State power of imposing "any" non-discriminatory tax on goods imported from sister States. *State of Bombay* v. *United Motors Limited*,

A I R 1953 S C 252=1953 S C R 1069 = 1953 S C J 373.

(547) *Art. 304 (b)—Proviso.*

President's previous sanction to introduction of bill is necessary: subsequent sanction is of no effect. *Saghir Ahmad* v. *State of U. P.* **A I R 1954 S C 728 (742) = 1954 S C J 819.**

(548) *Art. 311—Action against Government servant—Opportunity to show cause —When to be given (Government of India Act (1935), S. 240).*

It is when a stage is reached when definite conclusions have been come to as to the charges and the actual punishment to follow is provisionally determined on, that the statute gives the civil servant an opportunity for which sub-s. (3) of S. 240 of the Government of India Act, 1935 (which corresponds to Art. 311) makes provision, and at that stage a reasonable opportunity has to be afforded to the civil servant concerned. There is no anomaly in the view that the statute contemplates a reasonable opportunity at more than one stage. A. I. R. 1948 P. C. 121, *Rel. on*,

Held on facts that the petitioner had reasonable opportunity at both stages to enter upon his defence. He fully availed himself of the first opportunity and though a reasonable opportunity was also given to him at the second stage, he failed to avail himself of it and it was open to him to say that the requirements of Cl. (2) of Art. 311 had not been satisfied. *P. Joseph* v. *State of Travancore-Cochin*

A I R 1955 S C 160.

(549) *Art. 311 — Government of India Act (1935), S. 240—Discharge from service after one month's notice according to agreement—Section not contravened.*

Where a Railway employee is discharged from service after giving one month's notice according to the terms of his agreement of

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service he cannot be heard to complain that no charge-sheet had been formulated against him and proceedings had not been taken thereunder as required by S. 240 of the Government of India Act, 1935. *Gopal Krishna Potnay* v. *Union of India*

A I R 1954 S C 632 (633).

(550) *Art. 311— Fundamental Rules, Chap. IX, R. 56 (b) (i)—Voluntary Retirement at 55—S. 240 (3) Government of India Act 1935) does not apply—Servant on post retirement leave not competent to change his mind and apply for joining duties.*

It is a possible view to take upon the language of rule 56 (b) (i) of Chap. 9 of Fundamental Rules that a ministerial servant coming within its purview has normally the right to be retained in service till he reaches the age of 60. This is conditional undoubtedly upon his continuing to be efficient. If the Government required him to retire in terms of the Fundamental Rule 56 (b) (i), (that is, at the age of 55) it might be argued that he should have been given an opportunity to show that he was still efficient and able to discharge his duties and consequently could not be retired at that age.

The rule does not preclude a ministerial servant from waiving, by express agreement a right to which he might otherwise have been entitled under this rule. The rule does not contemplate a case where the servant of his own accord repeatedly applies for retirement on his completing 55 years, and for leave preparatory to retirement, and his application is ultimately granted and he was given post-retirement leave for a period of about six months from the date of retirement in terms of Rule 86, Chapter X of the Fundamental Rules on the ground that he had previously applied for leave which was at his credit but it was refused on the ground of retirements of public service. When a servant has attained the age of 55 years and for some reason or other himself confesses his inability to continue in service any longer and seeks permission for retirement would be a useless formality to ask him to show cause as to why his service should not be terminated Section 240 (3) of the Government of India Act, 1935 could not have any possible application in such circumstances.

It may be conceded that it is open to a servant, who has expressed a desire to retire

from service and applied to his superior officer to give him the requisite permission, to change his mind subsequently and ask for cancellation of the permission thus obtained; but he can be allowed to do so as long as he continues in service and not after it has terminated. But where the service of the servant has ceased, because of his retirement, he cannot be held to continue in his service, though at the time he is on post-retirement leave granted to him under special circumstances. It is no longer competent to him to apply for joining his duties, even though the post-retirement leave had not then run out. *Jai Ram* v. *Union of India.*

A I R 1954 S C 584
=1954 S C J 809.

(551) *Art. 311—Removal and dismissal —Termination of service.*

Under the Constitution, removal and dismissal stand on the same footing except as to future employment. In this sense removal is but a species of dismissal. Removal, like dismissal, no doubt brings about a termination of service but every termination of service does not amount to dismissal or removal. Article 311 does not apply to all cases of termination of service. *Shyamlal* v. *State of Uttar Pradesh and another.*

A I R 1954 S C 369 (374)
=1954 S C J 493.

(552) *Arts. 311, 14, 16 (1) and 32 (1)— Termination of contractual service by notice.*

A civil servant, who had been engaged on the basis of a special contract for a certain term, was, on the expiry of the term, reappointed by a further contract on a temporary basis. In accordance with the Government rules, which formed part of the contract, he was discharged from service after notice. The petitioner filed a petition under Art. 32 (1) seeking redress for breach of his fundamental rights under Arts. 14 and 16 (1). It was argued that the rights infringed were those conferred by Art. 311:

Held, (i) that Art. 311 had no application because there was neither a dismissal nor a removal from service, nor a reduction in rank. As Art. 311 had no application, no question of discrimination arose.

(ii) Article 16 (1) was equally inapplicable. The petitioner had not been denied any opportunity of employment or of appointment. He had been treated just like any other person to whom an offer of temporary employment was made. There can be no grievance against an offer of temporary employment on special terms as opposed to permanent employment;

(iii) There was no compulsion on the petitioner to enter into the contract he did. Having accepted the offer, he still had open to him all the rights and remedies available to other persons similarly situated to enforce any rights under his contract which had been denied to him, assuming there were any, and to pursue in the ordinary Courts of the land such remedies for a breach. The remedy of a writ was, therefore, misconceived. *Satish Chandra* v. *Union of India.*

A I R 1953 S C 250 (252)
=1953 S C R 655
=1953 S C J 323.

(553) *Art. 329 (b)—What is prohibited by Art. 329 (b).*

On a plain reading of Art. 329 (b), what is prohibited therein is the initiation of proceedings for setting aside an election otherwise than by an election petition presented to such authority and in such manner as provided therein. A suit for setting aside an election will be barred under this provision. *Hari Vishnu* v. *Ahmad Ishaque,*

A I R 1955 S C 233.

(554) *Art. 320 — Consultation with Public Service Commission — When to be made.*

Article 320 does not mean that the State should consult the Public Service Commission as many times as the Government servant against whom disciplinary action is taken, may choose to file review petitions.

Thus, where after the report of the Commissioner was placed before the Public Service Commission and the latter approved of the action proposed to be taken, the petitioner was given another opportunity to show cause but he did not avail himself of that opportunity or submit any explanation or show any cause on which the Public Service Commission could be consulted, there was in the circumstances no further necessity to consult the Public Service Commission. *P. Joseph* v. *State of Travancore-Cochin,*

A I R 1955 S C 160.

(555) *Arts. 329 (b), 226—Law does not contemplate two attacks on matters connected with election, one under Art. 226 during the process of election and the other when it is completed by election petition under Representation of the People Act—Rejection*

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or acceptance of nomination paper cannot be called in question under Art. 226 — Scheme of law of election in India — Representation of the People Act (1951).

The law of elections in India does not contemplate that there should be two attacks on matters connected with election proceedings, one while they are going on by invoking the extraordinary jurisdiction of the High Court under Art. 226 of the Constitution (the ordinary jurisdiction of the Courts having been expressly excluded) and, another after they have been completed by means of an election petition. Any matter which has the effect of vitiating an election should be brought up only at the appropriate stage in an appropriate manner before a special tribunal and should not be brought up at an intermediate stage before any Court. Under the election law, the only significance which the rejection of a nomination paper has consists in the fact that it can be used as a ground to call the election in question. Article 329 (b) was apparently enacted to prescribe the manner in which and the stage at which this ground, and other grounds which may be raised under the law to call the election in question, could be urged. It follows by necessary implication from the language of this provision that those grounds cannot be urged in any other manner, at any other stage and before any other Court. If the grounds on which an election can be called in quetion could be raised at an earlier stage and errors, if any, are rectified, there will be no meaning in enacting a provision like Art. 329 (b) and in setting up a special tribunal. Any other meaning ascribed to the words used in the article would lead to anomalies, which the Constitution could not have contemplated, one of them being that conflicting views may be expressed by the High Court at the pre-polling stage and by the election tribunal, which is to be an independent body, at the stage when the matter is brought up before it.

The Representation of the People Act is a self-contained enactment so far as elections are concerned, which means that whenever we have to ascertain the true position in regard to any matter connected with elections, we have only to look at the Act and the rules made thereunder. Section 80, which is drafted in almost the same language as Art. 329 (b), provides that "no election shall be called in question except by an election petition presented in accordance with the provisions of this Part." Section 80, along with Ss. 100, 105 and 170 are the main provisions regarding election matters being judicially dealt with, and there is no provision anywhere to the effect that anything connected with elections can be questioned at an intermediate stage.

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Where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of.

It will be a fair inference from the provisions of the Representation of the People Act to draw that the Act provides for only one remedy, that remedy being by an election petition to be presented after the election is over, and there is no remedy provided at any intermediate stage.

The argument that since the Representation of the People Act was enacted under Art. 327 subject to the provisions of the Constitution, it cannot bar the jurisdiction of the High Court to issue writs under Art. 226 of the Constitution is completely shut out by reading the Act along with Art. 329 (b). The language used in that article and in S. 80 of the Act is almost identical, with this difference only that the article is preceded by the words "notwithstanding anything in this Constitution." These words are quite apt to exclude the jurisdiction of the High Court to deal with any matter which may arise while the elections are in progress.

Article 329 (b) must be read as complementary to clause (a) of the article. Clause (a) bars the jurisdiction of the Courts with regard to such law as may be made under Arts. 327 and 328 relating to the delimitation of constituencies or the allotment of seats to such constituencies. Article 329 (b) ousts the jurisdiction of the Courts with regard to matters arising between the commencement of the polling and the final selection. If Part XV of the Constitution is a code by itself, i.e., it creates rights and provides for their enforcement by a special tribunal to the exclusion of all Courts including the High Court, there can be no reason for assuming that the Constitution left one small part of the election process namely acceptance or rejection of nomination paper to be made the subject matter of contest before the High Courts and thereby upset the time schedule of the elections.

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Having regard to the important functions which the legislatures have to perform in democratic countries, it has always been recognized to be a matter of first importance that elections should be concluded as early as possible according to time-schedule and all controversial matters and all disputes arising out of elections should be postponed till after the elections are over so that the election proceedings may not be unduly retarded or protracted.

In conformity with this principle, the scheme of the election law in this country as well as in England is that no significance should be attached to anything which does not affect the "election," and if any irregularities are committed while it is in progress and they belong to the category or class, which, under the law by which elections are governed would have the effect of vitiating the 'election' and enable the person affected to call it in question, they should be brought up before a special tribunal by means of an election petition and not be made the subject of a dispute before any Court while the election is in progress.

The right to vote or stand as a candidate for election is not a civil right but is a creature of statute or special law and must be subject to the limitations imposed by it.

Strictly speaking, it is the sole right of the Legislature to examine and determine all matters relating to the election of its own members, and if the legislature takes it out of its own hands and vests in a special tribunal an entirely new and unknown jurisdiction that special jurisdiction should be exercised in accordance with the law which creates it : (1876) 2 A C 102, *Ref. N. P. Punnuswami* v. *Returning Officer, Namakal* **A I R 1952 S C 64.**

(556) *Art. 329 (b)—The word "election" is used to embrace the whole procedure of election and is not confined to final result thereof—Rejection or acceptance of nomination paper is included in the term.*

The word "election" has been used in Part XV of the Constitution in the wide sense, that is to say, to connote the entire procedure to be gone through to return a candidate to the legislature. The use of the expression "conduct of elections" in Art. 324 specifically points to the wide meaning, and that meaning can also be read consistently into the other provisions which occur in Part XV including Art. 329 (b). The term

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"election" may be taken to embrace the whole procedure which consists of several stages and embraces many steps, whereby an "elected member" is returned, whether or not it be found necessary to take poll. It is not used in a narrow sense, A I R (15) 1928 Mad 253; A I R (33) 1946 Lah 85, *Ref.*

Rejection or acceptance of a nomination paper is included in the term "election". *N. P. Punuswami* v. *Returning Officer, Namakal.*

A I R 1952 S C 64.

(557) *Art. 329 — Representation of the People Act, S. 36—Is not ultra vires.*

In discharging the statutory duty imposed on him, the Returning Officer does not call in question any election. Scrutiny of nomination papers is only a stage, though an important stage, in the election process. It is one of the essential duties to be performed before the election can be completed and anything done towards the completion of the election proceeding can by no stretch of reasoning be described as questioning the election. Section 36 does not confer on the Returning Officer a jurisdiction which Art. 329 (b) confers on a Tribunal to be appointed in accordance with the article. Section 36 is, therefore, not ultra vires. *N. P. Punuswami* v. *Returning Officer, Namakal.* **A I R 1952 S C 64 =1952 S C R 218 =1952 S C J 100.**

(558) *Art. 330 — Scheduled Caste — Effect of conversion to Mahanubhava panth.*

In deciding the effect of conversion to Mahanubhava Panth of a Mahar under Art. 330 (1) (a) the court is not really concerned with its theology. What we have to determine are the social and the political consequences of such conversions and that must be decided in a commonsense practical way rather than on theoretical and theocratic grounds. Whatever the view of the founder of Mahanubhava sect may have been about caste, it is evident that there has been no rigid adherence to them among his followers in later years. They have either changed their views or have not been able to keep a tight enough control over converts who join them and yet choose to retain their old caste customs and ties.

Present day Mahanubhawas admit to their fold persons who elect to retain their old

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caste customs. That makes it easy for the old caste to regard the converts as one of themselves despite the conversion which for all practical purposes is only ideological and involves no change of status Conversion to the sect imports little beyond an intellectual acceptance of certain ideological tenets and does not alter the convert's caste status at any rate so far as the householder section of the Panth is concerned. *Chattarbhuj Vithaldas* v. *Moreshwar Parashram.*

A I R 1954 S C 236 (244, 245)
=1954 S C R 817.

(559) *Art. 362 — Merger of Indian States in Madhya Pradesh—Properties belonging to former rulers recognised to be private property of rulers – Acquisition of such property — Tenancy Laws—(M. P. Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act, (1 of 1951), S. 3.*

On the merger of the Indian States in Madhya Pradesh by virtue of the "covenant of merger" entered into between the rulers and the Government of India the properties belonging to the former rulers were recognised to be the "Private Property" of the rulers. It was urged that the estates sought to be acquired formed part of Rulers' "Personal Rights" guaranteed to them under the instrument of merger and that neither the impugned statute nor the notifications issued thereunder could deprive the Ruler of such properties in contravention of Art. 362: *Held*, there was no contravention of any guarantee or assurance given by the Government under the covenant of merger, as the estates in question were sought to be acquired only as the "Private property" of the Rulers and not otherwise. The compensation provided for, such as it was was in recognition of their private proprietorship as in the case of any other owner. *State of Bihar* v. *Kameshwar Singh.*

AIR 1952 S C 252=1952 S C R 889
=1952 S C J 354.

(560) *Arts. 363, 131, Proviso, 31 (1), 32 (2) — Rulers of acceding States making absolute muafi grants before accession — Government of India cannot revoke grants as act of State — (Government of India Act (1935), Ss. 6, 290A):— Act of State.*

The absolute muafi grants of lands made

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by the Rulers of erstwhile States of Charkari and Sairola which were independent States under the paramountcy of the British Crown, before the integration of the States into United States of Vindhya Pradesh and their subsequent accession to the Indian Dominion, cannot be revoked as act of State, by the State (of Uttar Pradesh) in consultation with Government of India, after the coming into force of the Constitution.

The accessions and the acceptance of them by the Dominion of India were acts of State into whose competency no Municipal Court can enquire; nor can any Court in India, after the Constitution, accept jurisdiction to settle any dispute arising out of them because of Article 363 and the proviso to Article 131; all they can do is to register the fact of accession.

It is within the competence of the new sovereign to accord recognition to existing rights in the conquered or ceded territories and, by legislation or otherwise, to apply its own laws to them; and these laws can, indeed when the occasion arises must, be examined and interpreted by the Municipal Courts of the absorbing State.

After the accession the States Charkari and Sairola, along with other States were declared on 23-1-1950 to be the Chief Commissioner's Province of Vindhya Pradesh under S. 290A (a), Government of India Act 1935, and were to be administered in all respects as Chief Commissioner's Province.

There cannot be nor there could be any confiscation of property, as an act of State in an area which was being administered by the Dominion Government in all respects as a Chief Commissioner's Province even if the person in possession was not, at the time, a national of the country.

Similarly, when the properties (the lands which were the subject matter of the grant) became, two days later, i. e. on 25-1-1950, part of the Uttar Pradesh by virtue of Provinces and States (Absorption of Enclaves) Order, 1950 the lands could not be confiscated.

In any case where the titles of the grantees to disputed lands had not been repudiated up to the 26th January 1950, these persons who were in de facto possession of the disputed lands, had rights in them which they could have enforced up to

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26-1-1950 in the Dominion Courts against all persons (except possibly the rulers who granted them or the Dominion of India, which point was not decided by the Supreme Court).

The Constitution by reason of the authority derived from, and conferred by the peoples of this land, blotted out in one magnificent sweep all vestiges of arbitrary and despotic power in the territories of India and over its citizens and lands and prohibited just such acts of arbitrary power to confiscate lands held by citizens.

Even if the Dominion of India had such power (though this was neither admitted nor decided by the Supreme Court), it could be waived and relinquished. From the attitude of the Dominion of India towards the states which it sought to draw into the Republic of India. which was yet to be free, sovereign, democratic, in inviting the Rulers of the States and their people to join the Constituent Assembly and take part in its deliberations and labours as citizens of India, inspired by common allegiance to the mother land and the acceptance of the invitation by the Rulers it was impossible to think of those who sat down together in the Constituent Assembly, and of those who sent representatives there, as conqueror and conquered, as those who ceded and as those who absorbed, as sovereigns or their plenipotentiaries, contracting alliances and entering into treaties as high contracting parties to an act of State. They were not there as sovereign and subject as citizen and alien, but as the sovereign peoples of India, free democratic equals, forging the pattern of a new life for the common weal. Every vestige of sovereignty was abandoned by the Dominion of India and by the States and surrendered to the peoples of the land who through their representatives in the Constituent Assembly hammered out for themselves a new Constitution in which all were citizens in a new order having but one tie, and owing but one allegiance, devotion, loyalty, to the Sovereign Democratic Republic that is India. At one stroke all other territorial allegiances were wiped out and the past was obliterated except where expressly preserved, at one moment of time the new order was born with its new allegiance springing from the same source for all, grounded on the same basis; the sovereign will of the peoples of India with no class, no

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caste, no race, no creed, no distinction, no reservation.

It is impossible for a sovereign to exercise an act of State against its own subjects. However disputable the proposition may be that an act of State can be exercised against a citizen who was once an alien the right being only in abeyance till exercised, there has never been any doubt that it can never be exercised against one who has always been a citizen from the beginning in territory which has from its inception belonged to the State seeking to exercise the right.

But however that may be, there is no question of conquest or cession here. The new Republic was born on 26-1-1950 and all derived their rights of citizenship from the same source and from the same moment of time; so also, at the same instant and for the same reason all territory within its boundaries became the territory of India. There is, as it were, from the point of view of the new State, Unity of Possession. Unity of Interest, Unity of Title and Unity of Time. All the citizens of India, whether residing in States or Provinces, enjoy the same fundamental rights and the same legal remedies to enforce them. The new Constitution therefore finally eradicates all artificial barriers which separated the States from Provinces.

The action of the States of Uttar Pradesh in consultation of the Government of India. in revoking the grants by an order dated 29-8-1952 and depriving the grantees of their properties cannot therefore be defended as an act of State. Art. 31 (1) as also Art 32 (2) is attracted and the grantees are entitled to a writ restraining the State of Uttar Pradesh from giving effect to the order and directing it to restore possession to the grantees if possession has been taken. *Virendra Singh* v. *State of Uttar Pradesh*,

A I R 1954 S C 447 (452, 453, 454) =1954 S C J 705.

(561) *Art. 363 (1) — Dispute in respect of agreement arising before Constitution — Article still applies.*

The time factor mentioned in Art 363(1) is related only to the document, that is, treaty, agreement etc., and not to the dispute. Clause (1) provides that such document should have been executed before the Constitution came into force and has to be in operation after the Constitution, but the dispute which is the subject matter of an

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Instrument of Accession even though had arisen before the commencement of the Constitution is governed by Art. 363 (1). This does not mean that the Article is made to operate retrospectively. For the bar to interference by the Ct. operates only after the Constitution came into force irrespective of the dispute concerned having arisen before or after the commencement of the Constitution. *State of Seraikella* v. *Union of India*, A I R 1951 S C 253 =1951 S C J 425 =1951 S C R 474.

(562) *Arts. 363, 374 (2)—Suit filed in Federal Court touching subject-matter arising out of Instrument of Accession — Suit removed to S. C. under Art. 374 (2) Supreme Court whether can entertain suit.*

In determining the operation of Cl. (2) of Art. 374 two stages have to be considered, namely, (1) whether the suits, appeals or proceedings which were pending before the F. C at the commencement of the Const. Ind., were within the jurisdiction of the Ct.; and (2) whether on removal of these suits, etc., to the S. C., the S. C. has jurisdiction to hear and determine the same having regard to all the provisions of the Constitution relating to the jurisdiction of the S. C. The S. C. being a new Ct. established by the Const. Ind., the jurisdiction of that Ct. has to be ascertained by considering all the relevant Arts. of the Cons. Ind.

On 16-1-1950, the Ruler of State of Seraikella (an Orissa State attached to the Eastern States Agency) brought a suit under S. 204, Govt. of India Act, 1935, in the F. C. of India against the Dominion of India and the Province of Bihar. In the suit the pltf. based his claim on the Instrument of Accession and challenged the taking over of administration of his State by the deft. under various Acts, Orders and notifications. It was argued for the pltf, that if there was any limitation the jurisdiction of the S. C. to hear such a suit, if instituted in it under its original jurisdiction, such limitation was not relevant to be considered in respect of suits which stood transferred to the S. C. under Art. 374 (2). It was further argued that as Art. 363 was prospective and not retrospective it did not affect the suit filed in the F. C. before the Const. Ind. came into operation:

Held (Per *Kania C. J, Vivian Bose and Patanjali Sastri JJ.*) — Overruling both

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the contentions that Art. 363 was the controlling Article over Art. 374 (2); that as the dispute arose out of the Instrument of Accession it fell within the purview of Art. 363 (1), that the S. C. having been created by the Constitution its original jurisdiction to hear was limited by the proviso to Arts. 131 and 363 (1), and that having regard to the subject-matter of the suit the S. C. had no jurisdiction to entertain the suit.

(Per *Das J., Mahajan J. contra*)—That after the repeal of the Govt. of India Act, 1935 and the commencement of the Const. Ind. the pltf. State was not an acceding State that might continue a suit filed under S. 204, Govt. of India Act that the pltf. had no existence in the eye of the Constitution and the suit must, therefore, be regarded as having abated by reason of the elimination of the pltf. State as State.

(Per *Mahajan J. differing from the majority view.)*—That the F. C. as well as the S. C. had the jurisdiction to entertain the suit. *State of Seraikella* v. *Union of India*

A I R 1951 S C 253 =1951 S C J 425 =1951 S C R 474.

(563) *Arts. 363 and 374(2)—Article 363 controls Art. 374 (2).*

(Per *Kania C. J., Vivian, Bose and Patanjali Sastri JJ., Mahajan J. Contra*) —The opening words of Art. 363, namely "notwithstanding anything in this Constitution in terms override all provisions of the Constitution. These all embracing opening words of Art. 363 override the operation of Art. 374 (2) also. If therefore a dispute arises in respect of a treaty, agreement etc, and if such treaty, agreement etc. had been executed before the Constitution by a Ruler of an Indian State and which was or had continued in operation after the commencement of the Constitution, the S. C. has no jurisdiction to determine the dispute. *State of Seraikella* v. *Union of India*

A I R 1953 S C 253 =1951 S C J 425 =1951 S C R 474.

(564) *Art. 368 — Constitution (First Amendment) Act, 1951—Validity of.*

The Constitution (First Amendment) Act 1951, passed by the present provisional Parliament purporting to insert, *inter alia*, Arts. 31A and 31B in the Constitution of

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India is *intra vires* and constitutional. *Shankari Prasad* v. *Union of India*

A I R 1951 S C 458
=1951 S C J 775
=1952 S C R 89.

(565) *Art. 368—Art. 368 is not complete code in itself.*

It is not correct to say that Art. 368 is a "complete code" in respect of the procedure provided by it. There are gaps in the procedure as to how and after what notice a bill is to be introduced, how it is to be passed by each House and how the President's assent is to be obtained. Having provided for the Constitution of a Parliament and prescribed a certain procedure for the conduct of its ordinary legislative business to be supplemented by rules made by each House (Art. 118), the makers of the Constitution must be taken to have intended Parliament to follow that procedure, so far as it may be applicable consistently with the express provisions of Art. 368, when they entrusted to it the power of amending the Constitution. (1915) A. C. 120, *Rel. on. Shankari Prasad* v. *The Union of India*

A I R 1951 S C 458 (Supra).

(566) *Arts. 368, 4, 169 and 240—Three classes of amendments contemplated by Constitution of India—Procedural difference between Agency which can effect amendment of Constitution.*

The Constitution provides for three classes of amendments of its provisions. First, those that can be effected by a bare majority such as that required for the passing of any ordinary law. The amendments contemplated in Arts. 4, 169 and 240 fall within this class, and they are specifically excluded from the purview of Art 368. Secondly, those that can be effected by a special majority as laid down in Art. 368. All Constitutional amendments other than those referred to above come within this category and must be effected by a majority of the total membership of each House as well as by a majority of not less than two-thirds of the members of that House present and voting; and thirdly those that require, in addition to the special majority above mentioned, ratification by resolutions passed by not less than one-half of the State specified in Schedules A and B of the First Schedule. This class comprises amendments which seek to make any change in the provisions referred to in the proviso to Art.

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368. Thus, the power of effecting the first class of amendments is explicitly conferred on "Parliament", that is to say, the two Houses of Parliament and the President (Art 79). But the fact that a different majority in the same body is required in Art. 368 for effecting the second and third categories of amendments cannot make the amending agency a different body. There is no force, therefore, in the suggestion that Parliament would have been referred to specifically if that body was intended to exercise the power. Having mentioned each House of Parliament and the President separately and assigned to each its appropriate part in bringing about constitutional changes, the makers of the Constitution presumably did not think it necessary to refer to the collective designation of the three units. *Shankari Prasad* v. *The Union of India*

A I R 1951 S C 458
=1951 S C J 775
=1952 S C R 89.

(567) *Arts. 372 and 239 — Government of India Act (1935), S. 94 (3) — Adaptation of Laws Order, 1950 para. 26—Order made by the Governor-General under S. 94 (3)—Saving of, by Art. 372 — Nature of order—"Laws in force" — Adaptation of order—Validity of—"Appropriate Government" — (Minimum Wages Act (1949), Ss. 2 (b) and 27).*

The Government of India Act, 1935 stands repealed by Art. 395 of the Constitution of India, but laws made thereunder which were in existence immediately before the commencement of the Constitution, will continue under Art. 372 (1) and can be adapted under the second clause of that Article.

There is not any material difference between the expressions "and existing law" and a "law in force" quite apart from Art. 366 (10) of the Constitution, the expression "Indian law" has itself been defined in S. 3 (29) of the General Clauses Act as meaning any Act, Ordinance, Regulation, Rule, order, or bye-law which before the commencement of the Constitution had the force of law in any Province of India or part thereof. Thus the words "law in force" as used in Art. 372 are wide enough to include not merely a legislative enactment but also any regulation of order which has the force of law, however, an order must

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be a legislative and not an executive order before it can come within the definition of the law.

An order made by the Governor-General under S. 94 (3) of the Government of India Act is not a mere executive order. An order made under S. 94 (3) investing the Chief Commissioner with the authority to administer a Province is really in the nature of a legislative provision which defines the rights and powers of the Chief Commissioner in respect to that Province. Such an order comes within the purview of Art. 372 of the Constitution and being a "law in force" immediately before the commencement of the Constitution will continue to be in force under Cl. (1) of the Article. Hence, the order made under S. 94 (3) of the Government of India Act is to be reckoned as an order made under Art. 239 of the Constitution and is within the competence of the President under cl. (2) of Art. 372 to make the adaptation order contained in Para. 26 of the Adaptation of Laws Order, 1950.

And by virtue of such an order made on 16-3-1949 the Chief Commissioner of Ajmer is competent to function as the 'appropriate Government for purposes of the Minimum Wages Act, 1948. All the steps, therefore, that are taken by the Chief Commissioner under the provisions of the Act including the issuing of notifications beginning with that issued on 17-3-1950 in terms of S. 27 to the final one issued on the 7th of October 1952 are legal and valid. *Edward Mills Company* v. *State of Ajmer*

A I R 1955 S C 25.

(568) *Arts. 372 and 395 — Non-applicability of Art. 372 to laws previously repealed or non-existent.*

Article 372 of the Constitution provided for the continuance in force in the territory of India, notwithstanding the repeal of the enactments referred to in Art. 395, of the law in force immediately before the commencement of the Constitution until altered, amended or repealed by competent legislature or authority. But that Article has no operation to the laws that had previously been repealed or which had died a natural death. *The State of Uttar Pradesh* v. *Seth Jagamander Das*,

A I R 1954 S C 683 (686).

Art. 379.

See also A I R 1953 S C 63 under Essential Supplies (Temporary Powers) Act, 1946.

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(569) *Arts. 379, 382 and 385 — Intent and purpose of.*

The whole intent and purpose of Arts. 379, 382 and 385 was to give recognition to those bodies or authorities or Houses of Legislature which were actually functioning before 26-1-50 and to invest them with the powers conferred by the provisions of this Constitution. The Constitution-makers wanted to indicate the arrangements made by them for the interval with certain amount of definiteness in order to avoid any dispute during the interim period as to who the body or authority was to exercise the powers conferred by the provisions of the Constitution. They therefore chose the formula that whichever body or authority or House or Houses of Legislature was actually functioning immediately before the commencement would be the body or authority of the House that would exercise the powers and perform the duties conferred by the provisions of the Constitution on the House, body or authority specified in the Constitution. They did not take any risk on this question and the bodies actually functioning were like persona designata invested with powers conferred by the Constitution.

Such a procedure was fully justified and was founded upon considerations of policy and necessity for the protection of the public and individuals whose interests may be affected thereby. It is manifest that endless confusion would have resulted if the Constitution had not adopted that formula and had not barred an inquiry into all questions as to the original information of such bodies by giving validity and recognition to those bodies or authorities as were actually functioning on 26-1-1950. *Malojirao* v. *State of Madhya Bharat*,

A I R 1954 S C 259 (263).

(570) Article 379—Art. 379 is not to be interpreted in its isolated relation to Art. 368 alone — It is to be viewed and interpreted in wider perspective of scheme of the Constitution. *Shankari Prasad* v. *Union of India*,

A I R 1951 S C 458
=1951 S C J 775
=1952 S C R 89.

(571) *Art. 385 — Interim Legislative Assembly of Madhya Bharat — Defect in formation — Effect — Validity of M. B. Act 28 of 1951—(Tenancy Laws — M. B. Abolition of Jagirs Act (28 of 1951), S. 1).*

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From the clear and unambiguous language of Art. 385 it follows that the Madhya Bharat Interim Legislative Assembly that was actually functioning on 26-1-1950 was invested by Constitution of India with powers conferred by the provisions of the Constitution, irrespective of the fact whether it had been properly constituted in accordance with the terms of the Government or not. The inquiry into this question thus became barred by adopting this procedure.

It thus follows that even if the Interim Legislative Assembly of Madhya Bharat which was functioning before 26-1-1950 was not formed in strict compliance with the provisions indicated in Sch. 4 of the Covenant its defective formation does affect the constitutionality of the Madhya Bharat Abolition of Jagirs Act, which was passed in the year 1951, after the Constitution of India had given recognition to and conferred powers on the Assembly under Art. 385 of the Constitution. When it made this law it was exercising its powers under the Constitution of India and not under the Covenant which brought it into existence. *Malojirao* v. *State of Madhya Bharat*, **A I R 1954 S C 259 (263).**

(572) *Arts. 385 and 246 — Nizam's powers — (President's Removal of Difficulties Order, 212-A (2)).*

Nizam as Rajpramukh had under the Constitution, Art. 385 and President's Removal of Difficulties Order 212-A (2) power to legislate but in conformity with Art. 246 and the lists and fundamental rights — (President's Removal of Difficulties Order, 212-A (2)). *Ammeerunisa* v. *Mehboob Begum*, **A I R 1953 S C 91 =1953 S C R 404 =1953 S C J 61.**

(573) *Art. 392—Adaptation of Art. 368 by Constitution (Removal of Difficulties) Order No. 2 made by President—Validity of.*

There is nothing in Art. 392 to suggest that the President should wait, before adapting a particular Article, till an occasion actually arose for the provisional Parliament to exercise the power conferred by that Article. Nor is there any question here of the President removing by his adaptation any of the difficulties which the Constitution has deliberately placed in the way of its amendment. The adaptation of Art. 368 made

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by the President leaves the requirement of a special majority untouched. The passing of an amendment bill by both Houses is no more a special requirement of such a bill than it is of any ordinary law made by Parliament. Therefore, the adaptation of Art. 368 by the Constitution (Removal of Difficulties) Order No. 2 made by the President is well within the powers conferred on him by Art. 392 and is valid and constitutional. *Shankari Prasad* v. *Union of India*, **A I R 1951 S C 458 =1951 S C J 775=1952 S C R 89,**

(574) *Sch. 7, List 2, Entries 18 and 36 — Interpretation — Entry 18 does not cover acquisition of land.*

Per *Das J.* — There is no doubt that 'land' in Entry 18, in List II has been construed in a very wide way but if 'land' or 'land tenure' in that entry is held to cover acquisition of land also, then Entry 36 in List II will have to be held as wholly redundant, so far as acquisition of land is concerned. To give a meaning and content to each of the two legislative category or head comprising land and land tenure and all matters connected therewith other than acquisition of land which should be read as covered by Entry 36 in List II. *State of Bihar* v. *Kamleshwar Singh*, **AIR 1952 S C 252=1952 S C R 889 =1952 S C J 354.**

(575) Sch. 7, List II, Entry 36 — State Legislature has power to acquire trust properties. (Per *Mahajan J.*) *State of Bihar* v. *Kameshwar Singh*, **AIR 1952 S C 252=1952 S C R 889 =1952 S C J 354.**

(576) *Sch. 7, List II, Entry 36; List 3, Entry 42; List 1, Entry 33 and Art. 31— 'Acquisition of property' in List II, Entry 36 — Meaning — Expression does not in itself carry any obligation to pay compensation.*

It is clear that the obligation for payment of just compensation is a necessary incident of the power of compulsory acquisition of property, both under the doctrine of the English Common Law as well as under the continental doctrine of eminent domain, subsequently adopted in America.

Our Constitution has raised this obligation to pay compesation for the compulsory acquisition of property of the status of a fundamental right and it has declar-

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ed that a law that does not make provision for payment of compensation shall be void. It did not leave the matter to be discovered and spelt out from out of the contents of Entry 36; they explicitly provided for it in Art. 31 (2) of the Constitution. As the obligation to pay has been made compulsory part of a statute that purports to legislate under Entry 33 of List I and Entry 36 of List II, it is not possible to accede to the contention that the duty to pay compensation is a thing inherent in the language of Entry 36.

The concept of acquisition and that of compensation are two different notions having their origin in different sources. One is founded on the sovereign power of the State to take, the other is based on the natural right of the person who is deprived of property to be compensated for his loss. One is the power to take, the other is the condition for the exercise of that power. Power to take was mentioned in Entry 36, while the condition for the exercise of that power was embodied in Art. 31 (2) and there was no duty to pay compensation implicit in the content of the entry itself.

It, therefore, cannot be contended that unless adequate provision is made by a law enacted under legislative power conferred by Entry 36 of List I for compensation, the law is unconstitutional as Entry 36 itself does not authorize the making of such a law without providing for compensation.

Nor can such a limitation be read in Entry 36 by reading this entry in conjunction with Entry 42 of List III. The two entries referred to above are merely heads of legislation and are neither interdependent nor complementary to one another. It is by force of the provisions of Art. 31 (2) that it becomes obligatory to legislate providing for compensation under Entry 42 of the Concurrent List in order to give validity to a law enacted under Entry 36 and not by reason of the use of the words "subject to" in the wording of Entry. The only purpose of the words "subject to" occurring in Entry 36 is to indicate that legislation under Entry 36 would be subject to any law made by Parliament in exercise of its legislative power under Entry 42 of the Concurrent List. Both Legislatures can legislate under Entry 42 but the Parliamentary Statute made in exercise of powers under this entry would have preference

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over a State law in case of repugnancy and it was for this reason that reference was made to Entry 42, List III in the head of legislation mentioned in the State List under Entry 36. In other words, it only means that whenever a law is made by a State Legislature in exercise of its legislative power under Entry 36, that law will be subject to the provisions of a Parliamentary Statute made in exercise of its legislative powers under Entry 42 of the Concurrent List.

The contention that the power to make a law under Entry 42 of List 3 is a power coupled with a duty and hence where the Legislature has authorised expropriation under a law passed under that entry, it is also bound to make a law laying down the principles on which such owners should be compensated for their loss, is not sound. (1880) 5 A C 214, *Disting.*

Failure to make a law under Entry 42 cannot make a law made under Entry 36 bad.

(Per *Patanjali Sastri C. J.*) — While certain powers may be granted in order to be exercised in favour of certain persons who are intended to be benefited by their exercise, and on that account may well be regarded as coupled with a duty to exercise them when an appropriate occasion for their exercise arises, the power granted to Legislature to make a law with respect to any matter cannot be brought under that category. It cannot possibly have been intended that the Legislature should be under an obligation to make a law in exercise of that power, for no obligation of that kind can be enforced by the Court against a legislative body. *State of Bihar* v. *Kameshwar Singh*,

AIR 1952 S C 252=1952 S C R 889 =1952 S C J 354.

(577) *Sch. 7, List II, Entry 1—"Public order", meaning of.*

"Public order" is an expression of wide connotation and signifies that state of tranquillity prevailing among tne members of a political society as a result of the internal regulations enforced by the Government which they have instituted. *Romesh Thapar* v. *State of Madras*,

A I R 1950 S C 124 =1950 S C R 594=1950 S C J 418.

(578) *Sch. 7, List III, Entry 42—Scope —Words "form .... be given"—Meaning.*

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(Per *Mahajan and Chandrasekhara Aiyar JJ.*)—The last words in Entry 42, "form and the manner in which such compensation is to be given" clearly mean that the principles determining compensation must lead to the giving or payment of some compensation. To negate compensation altogether by enunciation of principles leading to such a result would be to contradict the very terms of the entry and such a meaning could not be attributed to the framers of the Lists. A I R 1941 F C 16, *Disting. State of Bihar* v. *Kameshwar Singh*,

A I R 1952 S C 252
1952 S C R 889=1952 S C J 354.

(579) *Sch. 7, List I, Entry 9 and List III, Entry 3—Preventive detention, meaning of.*

There is no authoritative definition of the term 'Preventive Detention' in Indian law. The word 'Preventive' is used in contradistinction to the word 'Punitive.' The object is not to punish a man for having done something but to intercept him before he does it and to prevent him from doing it. No offence is proved, nor any charge formulated, and the justification of such detention is suspicion or reasonable probability and not criminal conviction which can only be warranted by legal evidence. *Gopalan* v. *State of Madras*, **A I R 1950 S C 27**
=1950 S C J 174=1950 S C R 88.

CONSTITUTIONAL LAW

(580) *Constitutional Law — Plenary power of Legislature — Delegation of subsidiary or ancillary measure.*

When a Legislature is given plenary power to legislate on a particular subject there must also be an implied power to make laws incidental to the exercise of such power. It is a fundamental principle of constitutional law that everything necessary to the exercise of a power is included in the grant of the power. A Legislature cannot certainly strip itself of its essential functions and vest the same on an extraneous authority. The primary duty of law-making has to be discharged by the Legislature itself but delegation may be resorted to as a subsidiary or an ancillary measure. (1909) 8 C L R 626 (637) (Aus.); (1878) 3 A C 889, *Rel. on. Edward Mills Co.* v. *State of Ajmer*, **A I R 1955 S C 25.**

(581) *Constitutional Law — Powers of Ruler of former Indian State to enact extra-territorial laws — (Penal Code (1860), S. 4).*

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The Rulers of the former Indian States had prior to 1947, the authority to pass extra-territorial laws relating to offences committed by their own subjects and vesting in their own Courts the power to try them, except where the contrary is made out by evidence in the case of any individual State. *Shiv Bahadur Singh* v. *State of V. P.*, **A I R 1955 S C 394.**

(582) *Constitutional Law — Delegated legislation — Limitations.*

Per *Fazl Ali J.*— (1) The legislature must normally discharge its primary legislative function itself and not through others. (2) Once it is established that it has sovereign powers within a certain sphere, it must follow as a corollary that it is free to legislate within that sphere in any way which appears to it to be the best way to give effect to its intention and policy in making a particular law and it may utilize any outside agency to any extent it finds necessary for doing things which it is unable to do itself or finds it inconvenient to do. In other words, it can do everything which is ancillary to and necessary for the full and effective exercise of its power of legislation. (3) It cannot abdicate its legislative functions, and therefore while entrusting power to an outside agency, it must see that such agency acts as a subordinate authority and does not become a parallel legislature. (4) The doctrine of separation of powers and the judicial interpretation it has received in America ever since the American Constitution was framed enables the American Courts to check undue and successive delegation but the Courts of this country are not committed to that doctrine and cannot apply it in the same way as it has been applied in America. Therefore, there are only two main checks in this country on the power of the legislature to delegate, these being its good sense and the principle that it should not cross the line beyond which delegation amounts to "abdication and self-effacement".

Delegated legislation using the expression in the popular sense has become a present-day necessity, and it has come to stay — it is both inevitable and indispensable. The legislature has now to make so many laws that it has no time to devote to all the legislative details, and sometimes the subject on which it has to legislate is of such a technical nature that all it can do is to

state the broad principles and leave the details to be worked out by those who are more familiar with the subject. Again, when complex schemes of reform are to be the subject of legislation, it is difficult to bring out a self-contained and complete Act straightway, since it is not possible to foresee all the contingencies and envisage all the local requirements for which provision is to be made. Thus, some degree of flexibility becomes necessary, so as to permit constant adaptation to unknown future conditions without the necessity of having to amend the law again and again. The advantage of such a course is that it enables the delegated authority to consult interests likely to be affected by a particular law, make actual experiments when necessary, and utilize the results of its investigations and experiments in the best way possible. There may also arise emergencies and urgent situations requiring prompt action and the entrustment of large powers to authorities who have to deal with the various situations as they arise.

The complexity of modern administration and the expansion of the functions of the State to the economic and social sphere have rendered it necessary to resort to new forms of legislation and to give wide powers to various authorities on suitable occasions. But while emphasizing that delegation is in these days inevitable, one should not omit to refer to the dangers attendant upon the injudicious exercise of the power of delegation by the legislature. The dangers involved in defining the delegated power so loosely that the area it is intended to cover cannot be clearly ascertained and in giving wide delegated powers to executive authorities and at the same time depriving a citizen of protection by the Courts against harsh and unreasonable exercise of powers, are too obvious to require elaborate discussion.

Per *Mukherjea J.*—The Legislature cannot part with its essential legislative function which consists in declaring its policy and making it a binding rule of conduct. A surrender of this essential function would amount to abdication of legislative powers in the eye of law. The policy may be particularised in as few or as many words as the legislature thinks proper and it is enough if an intelligent guidance is given to the subordinate authority. The Court can

interfere if no policy is discernible at all or the delegation is of such an indefinite character as to amount to abdication, but as the discretion vests with the legislature in determining whether there is necessity for delegation or not, the exercise of such discretion is not to be disturbed by the Court except in clear cases of abuse. These are the fundamental principles and in respect to the powers of the legislature the constitutional position in India approximates more to the American than to the English pattern. There is a basic difference between the Indian and the British Parliament in this respect. There is no constitutional limitation to restrain the British Parliament from assigning its powers where it will, but the Indian Parliament qua legislative body is fettered by a written constitution and it does not possess the sovereign powers of the British Parliament. The limits of the powers of delegation in India would therefore have to be ascertained as a matter of construction from the provisions of the Constitution itself and the right of delegation may be implied in the exercise of legislative power only to the extent that it is necessary to make the exercise of the power effective and complete.

Per *Bose J.*— The concept of legislative power which had hitherto been accepted in India continued to hold good but that this limitation was placed upon it by the Constitution, namely that wherever the Constitution empowers Parliament to do a particular thing as opposed to legislating generally on a particular topic, there can be no delegation. Parliament must itself act.

It has been held from the earliest times, even when viewed through purely British eyes, that a legislature created by the British Parliament (1) cannot act beyond the ambit of its powers the extent of which must be gathered from the document which brings it into being, (2) it cannot create a new legislature for the purpose of legislating generally and (3) it cannot abdicate. The same limitations exist in the case of the Indian Parliament because that, unlike the British Parliament, is not free to do as it likes; it is bound by the Constitution.

Per *Kania C. J.*—While a legislature, as a part of its legislative functions, can confer powers to make rules and regulations for carrying the enactment into operation and effect, and while a legislature has power to

lay down the policy and principles providing the rule of conduct and while it may further provide that on certain data or facts being found and ascertained by an executive authority, the operation of the Act can be extended to certain areas or may be brought into force on such determination which is described as conditional legislation, the power to delegate legislative functions generally is not warranted under the Constitution of India at any stage. Therefore, the contention that legislative power carries with it a general power to delegate legislative functions, so that the legislature may not define its policy at all and may lay down no rule of conduct but that whole thing may be left either to the executive authority or administrative or other body, is unsound.

The true test in respect of 'abdication' or 'effacement' appears to be whether in conferring the power to the delegate, the legislature, in the words used to confer the power, retained its control. Does the decision of the delegate derive sanction from the act of the delegate or has it got the sanction from what the legislature has enacted and decided?

To say that the true test of effacement is that the authority which confers power on the subordinate body should not be able to withdraw the power appears to be meaningless.

Abdication by a legislative body need not necessarily amount to a complete effacement of it. Abdication may be partial or complete. When in respect of a subject in the Legislative List the Legislature says that it shall not legislate on that subject but would leave it to somebody else to legislate on it, why does it not amount to abdication or effacement. If full powers to do anything and everything which the legislature can do are conferred on the subordinate authority, although the legislature has power to control the action of the subordinate authority, by recalling such power of repealing the Acts passed by the subordinate authority, the power conferred by the instrument amounts to an abdication or effacement of the legislature conferring such power. *In re Art. 143, Constitution of India and Delhi Laws Act (1912) etc.*

A I R 1951 S C 332
=1951 S C J 527=1951 S C R 747.

(583) *Constitutional Law—Doctrine of pith and substance.*

The doctrine of pith and substance postulates, for its application, that the impugned law is substantially within the legislative competence of the particular Legislature that made it, but only incidentally encroached upon the legislative field of another Legislature. The doctrine saves this incidental encroachment if only the law is in pith and substance within the legislative field of the particular Legislature which made it. *State of Bombay* v. *Narottamdas,*

A I R 1951 S C 69
=1951 S C J 103=1951 S C R 51.

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See also (i) S. 1. A I R 1953 S C 426.
(ii) A I R 1953 S C 75.

(584) *Ss. 1 and 3 — Contempt of Court, what amounts to : Cr. Misc. No. 17 of 1950, D/- 16-4-51 (All.), REVERSED.*

Proceedings under S. 145, Criminal P. C., pending before Sub-Divisional Magistrate—Opposite party filing counter application with recommendatory letter of Congress secretary before District Magistrate — District Magistrate as a superior officer transmitting such application together with the letter to the Sub-Divisional Magistrate concerned for report in the usual and normal course of official practice—Such action of District Magistrate cannot amount to contempt of Court of Sub-Divisional Magistrate even if the application contains material which had a tendency to interfere with course of justice. *Rizwan-Ul-Hasan* v. *State of Uttar Pardesh.*

A I R 1953 S C 185
=1951 S C R 581
=1953 S C J 255.

(585) *Ss. 1 and 3—Contempt of Court, what amounts to — (Criminal P. C. (1898), S. 528) : Cr. Misc. No. 17 of 1950, D/- 16-4-1951 (All), REVERSED.*

Where an application containing allegations against a trial Magistrate is made by a third party to the District Magistrate the latter is entitled to use his powers under S. 528, Criminal P. C., and sent the application in the normal and usual course of his functions to the Magistrate concerned for remarks. There is nothing in such action of the District Magistrate which

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amounts to a contempt of Court. *Rizwan-Ul-Hasan* v. *State of Uttar Pradesh.*

A I R 1953 S C 185
=1951 S C R 581
=1953 S C J 255.

(586) *S. 1—Jurisdiction of Court.*

The jurisdiction in contempt is not to be invoked unless there is real prejudice which can be regarded as a substantial interference with the due course of justice. The Court will not exercise its jurisdiction upon a mere question of propriety : AIR 1931 Cal 257, *Approved. Rizwan-Ul-Hasan* v. *State of Uttar Pradesh.*

A I R 1953 S C 185
=1951 S C R 581
=1953 S C J 255.

(587) *S. 2 (3) — Contempt of subordinate Court — Jurisdiction of High Court —When excluded.*

Sub-section (3) of S. 2 excludes the jurisdiction of High Court only in cases where the acts alleged to constitute contempt of a subordinate Court are punishable as contempt under specific provisions of the Indian Penal Code but not where these acts merely amount to offences of other description for which punishment has been provided for in the Indian Penal Code. This is clear from the language of the sub-section which uses the words "where such contempt is an offence" and does not say "where the act alleged to constitute such contempt is an offence." There are offences which are punishable as contempt under the Indian Penal Code and as subordinate Court can sufficiently vindicate their dignity under the provisions of criminal law in such cases the Legislature deemed it proper to exclude them from the jurisdiction of the High Court under S. 2 (3), Contempt of Courts Act; but it would not be correct to say that the High Court's jurisdiction is excluded even in cases where the act complained of, which is alleged to constitute contempt, is otherwise an offence under the Indian Penal Code : 1943 Nag L J 505 : AIR 1943 Nag 334 : 45 Cr L J 407, OVERRULED; *Case law referred. Ramakrishna. Reddy* v. *State of Madras.*

A I R 1952 S C 149.

(588) *S. 3—Contempt and libel—Scandalizing Court — Purpose of contempt proceeding — Resolution by Bar Association pointing out to superior authorities*

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that certain judicial Officers were incompetent — Publication of resolution — How far contempt : A I R 1950 All 556 (FB), REVERSED.

The summary jurisdiction exercised by superior courts in punishing contempt of their authority exists for the purpose of preventing interference with the course of justice and for maintaining the authority of law as is administered in the courts. The object of contempt proceedings is not to afford protection to Judges personally from imputations to which they may be exposed as individuals: it is intended to be a protection to the public whose interests would be very much affected if by the act or conduct of any party, the authority of the court is lowered and the sense of confidence which people have in the administration of justice by it is weakened.

Cases of contempt which consist of scandalising the court itself, are fortunately rare and require to be treated with much discretion. Proceedings for this species of contempt should be used sparingly and always with reference to the administration of justice. If a judge is defamed in such a way as not to affect the administration of justice, he has the ordinary remedies for defamation if he should feel impelled to use them.

There are two primary considerations which should weigh with the court when it is called upon to exercise the summary powers in cases of contempt committed by 'scandalising' the court itself. In the first place, the reflection on the conduct or character of a judge in reference to the discharge of his judicial duties, would not be contempt if such reflection is made in the exercise of the right of fair and reasonable criticism which every citizen possesses in respect of public acts done in the seat of justice. It is not by stifling criticism that confidence in courts can be created.

In the second place, when attacks or comments are made on a judge or judges, disparaging in character and derogatory to their dignity, care should be taken to distinguish between what is a libel on the judge and what amounts really to contempt of the court. The fact that a statement is defamatory so far as the judge is concerned does not necessarily make it a contempt.

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A defamatory attack on a judge may be a libel so far as the judge is concerned and it would be open to him to proceed against the libellor in a proper action, if he so chooses. If, however, the publication of the disparaging statement is calculated to interfere with the due course of justice or proper administration of law by such court, it can be punished summarily as contempt. One is a wrong done to the judge personally while the other is a wrong done to the public. It will be an injury to the public if it tends to create an apprehension in the minds of the people regarding the integrity, ability or fairness of the judge or to deter actual and prospective litigants for placing complete reliance upon the court's administration of justice, or if it is likely to cause embarrassment in the mind of the judge himself in the discharge of his judicial duties.

It is not necessary to prove affirmatively that there has been an actual interference with the administration of justice by reason of such defamatory statement; it is enough if it is likely, or tends in any way, to interfere with the proper administration of law.

A bar association, upon receipt of complaints from litigants, after enquiry, passed a resolution, that they had formed an opinion that certain two named officers, one being a Judicial Magistrate and the other a revenue officer, were thoroughly incompetent in law, did not inspire confidence in their judicial work, were given to stating wrong facts when passing orders and were overbearing and discourteous to the litigant public and the lawyers alike. Besides the above mentioned defects common to both of them, other defects were separately catalogued. The copies of the resolution were sent to the Premier, the Chief Secretary, the Commissioner and the District Magistate for suitable action. The meeting of the Executive Committee of the Bar Association was held in camera and no non-member was allowed to be present at it. The resolution was typed out by the President himself and the proceedings were not recorded in the Minute Book of the Association at all.

Held that the only portion of the resolution to which prima facie objection could be taken was that which described these officers as thoroughly incompetent in law

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and whose judicial work did not inspire confidence. These remarks were certainly of a sweeping nature and could scarcely be justified. Assuming, however, that this portion of the resolution was defamatory, the question arose whether it could be held to amount to contempt of court. It may be that pleas of justification or privilege are not strictly speaking available to the defendant in contempt proceedings. The question of publication also in the technical sense in which it is relevant in a libel action may be inappropriate to the law of contempt. But, leaving out cases of ex facie contempt, where the question arises as to whether a defamatory statement directed against a judge is calculated to undermine the confidence of the public in the capacity or integrity of the Judge, or is likely to deflect the court itself from a strict and unhesitant performance of its duties, all the surrounding facts and circumstances under which the statement was made and the degree of publicity that was given to it would undoubtedly be relevant circumstances. No doubt, there was publication as is required by the law of libel, but in contempt proceedings, that is not by any means conclusive. What is material, is the nature and extent of the publication and whether or not it was likely to have an injurious effect on the minds of the public or of the judiciary itself and thereby lead to interference with the administration of justice. On the materials it was difficult to say that the circumstance under which the representation was made by the appellants (the members of the executive committee of the Bar Association) was calculated to have such effect. There might have been some remote possibility but that could be taken note of. The contempt, if any, was only of a technical character, and that after the affidavits were filed on behalf of the appellants before the High Court, the proceedings against them should have been dropped : AIR 1950 All 556 (FB), REVERSED. *Brahma Prasad* v. *State of U. P.* **A I R 1954 S C 10 =1953 S C R 1169.**

(589.90) *S. 4 — Contempt — Apology — (Contempt of Courts).*

There cannot be both justification and an apology. The two things are incompatible. Again an apology is not a weapon of defence to purge the guilty of their offence;

nor is it intended to operate as a universal panacea, but it is intended to be evidence of real contriteness.

Counsel who sign applications or pleadings containing matter scandalizing the Court without reasonably satisfying themselves about the prima facie existence of adequate grounds therefor, with a view to prevent or delay the course of justice, are themselves guilty of contempt of Court, and it is no duty of a counsel to his client to take any interest in such applications; on the other hand, his duty is to advise his client for refraining from making allegations of this nature in such applications.

Once the fact is recognized that the members of the Bar have not fully realized the implications of their signing such applications and are firmly under the belief that their conduct in doing so is in accordance with professional ethics, in such cases even a qualified apology may well be considered by a Court. In border line cases where a question of principle about the rights of counsel and their duties has to be settled, an alternative plea of apology merits consideration; for, it is possible for a Judge who hears the case to hold that there is no contempt in which case a defence of unqualified apology is meaningless, because that would amount to the admission of the commission of an offence. Every form of defence in a contempt case cannot be regarded as an act of contumacy. It depends on the circumstances of each case and on the general impression about a particular rule of ethics amongst the members of the profession.

There was considerable misconception amongst a section of the Bar about advocates' responsibilities in matters of signing transfer applications from one bench to another bench of the High Court. A section of the Bar was under an erroneous impression that when a counsel is acting in the interests of his client, or in accordance with his instructions he is discharging his legitimate duty to his client even when he signs an application or a pleading which contains matter scandalizing the Court. They thought that when there was conflict between their obligations to the court and their duty to the client, the latter prevailed.

Held that it was thus necessary to have that question settled and any effort on the part of the counsel to have that point settled could not be regarded as contumacy

or a circumstance which aggravated the contempt. The expression of regret in the alternative in such a case should not have been ignored but should have been given due consideration. Once however the High Court found that they were guilty of contempt, they would have been well advised to tender an unqualified apology to that Court forthwith. But perhaps they were still under the delusion that they were right and the Court was in error, and that by coming to the Supreme Court they might be able to have the question of principle settled as they contended. As soon as the Supreme Court indicated to the counsel that they were in error, they and their counsel immediately tendered an unqualified apology which was repeated again in absolute terms at the second hearing. The unqualified apology was sufficient to purge the contempt committed by the counsel. Further, condemnation for contempt by a High Court of senior members of the Bar is itself a heavy punishment to them as it affects them in their professional career and is a great blot on them. *M. Y. Shareef* v. *Judges of Nagpur High Court*, AIR 1955 S C 19.

CONTRACT ACT, 1872

See also (1) S. 11. A I R 1952 S C 358.
(2) S. 23. A I R 1954 S C 557.
(3) Ss. 23, 24 and 31. A I R 1954 S C 26.
(4) S. 43. A I R 1952 S C 47.
(5) S. 217. A I R 1953 S C 140.
(6) S. 219. A I R 1954 S C 470.

(591-92) *S. 2 (a) and (b) — Contract — Negotiation by letter—Statement of lowest price — Counter-offer—Acceptance of.*

The mere statement of the lowest price at which the vendor would sell contains no implied contract to sell at the price to the person making the enquiry.

The plaintiff, who had made an offer of Rs. 6,000 for the purchase of "Morvern Lodge" owned by the defendant, wrote to the agent of the defendant asking him whether his offer had been accepted and saying that he was prepared to accept any higher price if found reasonable. To this letter the agent replied: "In reply to your letter . . . I received yesterday a cable from [the defendant] regarding your offer of Rs. 6,000 which reads as follows: 'Wont accept less than rupees ten thousand'." The plaintiff accepted what he termed this as counter-offer made by the defendant. In a suit

brought by the plaintiff for the specific performance :

Held that the defendant did not make any counter-offer in his cable but was merely inviting offers, that the plaintiff had made an offer of rupees ten thousand which was subject to acceptance by the defendant and that as there was no express assent to this offer made by the plaintiff there was no concluded contract. *MacPherson* v. *Appanna*, A I R 1951 S C 184 =1951 S C J 257=1951 S C R 161.

(593) *S. 2 (b)—Completion of contract.*

The letters merely set out the terms on which the parties were ready to do business with each other if and when orders were placed and executed.

Held that as soon as an order was placed and accepted a contract arose. It is true this contract would be governed by the terms set out in the letters but until an an order was placed and accepted there was no contract. Also, each separate order and acceptance constituted a different and distinct contract. *Chatturbhuj Vithaldas* v. *Moreshwar Parashram*,

A I R 1954 S C 236 (238) =1954 S C R 817.

See also Rose & Frank Co. v. J. R. Crompton, 1925 A. C. 445.

(594) *S. 2 (d) — Contract containing several terms — (Representation of the People Act, 1951, S. 7 (d)).*

When a contract consists of a number of terms and conditions, each condition does not form a separate contract but is an item in the one contract of which it is a part. The consideration for each condition in a case like this is the consideration for the contract taken as a whole. It is not split up into several considerations apportioned between each term separately. *Chatturbhuj Vithaldas* v. *Moreshwar Parashram*,

A I R 1954 S C 236 (242) =1954 S C R 817.

(595) *S. 2 (c)—"Promisee"—(Specific Relief Act (1877), S. 23) — (Civil P. C. (1908), S. 66.)*

Mortgage of joint family properties by *A* and *B* (father and son) — Execution by mortgagees of decree obtained by them on mortgage — Mortgagees anxious of arriving at settlement with all the members of mortgagor's family and to avoid objections from them to the sale, entering into negotiations with them—Arrangement made at a gathering of mortgagee's representative and the family of mortgagors for sale of mortgaged properties and certain others by the mortgagors to the mortgagees — Mortgagors agreeing to mortgagees getting the properties in auction or by sale and expressing readiness to execute any document desired by the mortgagees — *B's* wife, a purdanashin lady, present at the negotiations demanding that the item of mortgaged property should be transferred to her when demanded — Mortgagees agreeing on condition that she paid the expenses for reconveyance — Letter sent by mortgagors embodying the arrangement arrived at stating that the particular item was to be transferred in the name of *B's* wife and she should pay the expenses—Letter of acceptance from mortgagee that it would be so transferred at the cost of mortgagors when they asked for the transfer — Property put into possession of *B's* wife by mortgagees within a few months of their promise and they recovering the expenses as well as some taxes paid by them — *B's* wife and *B* also expending sums of money on remodelling and repairs without objections from mortgagee—Held that in view of the statements in the letter of mortgagors that the property was to be transferred in the name of *B's* wife and that she was to bear the expenses and that mortgagees agreed to the same on the demand made by her at the negotiations, *B's* wife was the "promisee" under the contract even though the letter of acceptance stated that the transfer would be made on mortgagors bearing the expenses and asking for the transfer — Held also that the promisors who had fulfilled their promise in all respects excepting the execution of a formal sale deed were not entitled to raise a plea that *B's* wife was not entitled to demand specific performance thereof on the ground that she was not a party to the contract — Held further that her suit was not barred by S. 66, Civil P. C., since the mortgagees who purchased the property in their own name did so in order to fulfil their agreement with *B's* wife, the plea of benami in such situation was unsustainable.

Her suit could not also be resisted on the ground of delay since she had been in possession all the time and had incurred considerable expenses. *Gorakh Ram* v. *Laxmibai*, A I R 1953 S C 443.

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(596) *S. 20—Mistake as to matter of fact.*

Where the Government represented to A that it had the right to forfeit the lease of B and grant a fresh lease to him and A believing in that representation entered into the contract on the understanding but as a result of the decision of the Privy Council the Government became incapable of making out the title which it asserted it had at the time of the contract, but its title was not wholly gone, but was restricted only by reason of the lease which had several years to run: *Held* that in the circumstances it might have been open to A to repudiate the contract if he so liked, but the Government could not certainly plead that the contract was void on the ground of mistake and refuse to perform that part of the agreement which it was possible for it to perform. *Kalyanpur Lime Works Ltd.* v. *State of Bihar*,

A I R 1954 S C 165 (168) = 1954 S C R 958 = 1954 S C J 49.

(597) *S. 21—Mistake as to law.*

The mistake with regard to the law of registration upon the validity of the assignment deed would be a mistake of law and under S. 21 the contract would not be void on that ground. *Kalyanpur Lime Works Ltd.* v. *State of Bihar*,

A I R 1954 S C 165 (168) = 1954 S C R 958=1954 S C J 49.

(598) *Ss. 32, 56 — Frustration.*

The essential idea upon which the doctrine of frustration is based is that of impossibility of performance of the contract, in fact impossibility and frustration are often used as interchangeable expressions. The changed circumstances make the performances of the contract impossible and the parties are absolved from the further performance of it as they did not promise to perform an impossibility. The doctrine of frustration is really an aspect or part of the law of discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done and hence comes within the purview of S. 56. To the extent that the Contract Act deals with a particular subject, it is exhaustive upon the same and it is not permissible to import the principles of English law 'dehors' these statutory provisions. The decisions of the English Courts possess only a persuasive value and may be helpful in showing how the Courts in England have decided cases under circumstances similar to those which have come

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before Indian Courts. In deciding cases in India the only doctrine that we have to go by is that of supervening impossibility or illegality as laid down in S. 56, taking the word 'impossible' in its practical and not literal sense. Section 56 lays down a rule of positive law and does not leave the matter to be determined according to the intention of the parties. In cases, where the Court gathers as a matter of construction that the contract itself contained impliedly or expressly a term, according to which it would stand discharged on the happening of certain circumstances, the dissolution of the contract would take place under the terms of the contract itself and such cases would be outside the purview of S. 56, altogether. They would be dealt with under S. 32 which deals with contingent contracts or similar other provisions contained in the Act. In the large majority of cases, however, the doctrine of frustration is applied not on the ground that the parties themselves agreed to an implied term which operated to release them from the performance of the contract. The relief is given by the Court on the ground of subsequent impossibility when it finds that the whole purpose or basis of a contract was frustrated by the intrusion or occurrence of an unexpected event or change of circumstances which was beyond what was contemplated by the parties at the time when they entered into the agreement. When such an event or change of circumstances occurs which is so fundamental as to be regarded by law as striking at the root of the contract as a whole, it is the Court which can pronounce the contract to be frustrated and at an end. The Court undoubtedly has to examine the contract and the circumstances under which it was made. The belief, knowledge and intention of the parties are evidence, but evidence only on which the Court has to form its own conclusion whether the changed circumstances destroyed altogether with the basis of the adventure and its underlying object. This is really a rule of positive law and as such comes within the purview of S. 56 of the Contract Act. *Satyabrata Ghose* v. *Mugneeram Bangur and Co.*,

A I R 1954 S C 44 (47, 48) =1954 S C R 310=1954 S C J 1.

(599) *Ss. 56, 62, 64 — Frustration.*

If and when there is frustration the dissolution of the contract occurs automatically. It does not depend, as does rescission

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of a contract on the ground of repudiation or breach, or on the choice or election of either party. It depends on the effect of what has actually happened on the possibility of performing the contract. What happens generally in such cases is that one party claims that the contract has been frustrated while the other party denies it. The issue has got to be decided by the Court ex post facto, on the actual circumstances of the case. The contract in suit was not an ordinary contract for sale and purchase of a piece of land; it was an integral part of a development scheme started by a company and was one of the many contracts that had been entered into by a large number of persons with the company. The object of the company was undoubtedly to develop a fairly extensive area which was still undeveloped and make it usable for residential purposes by making roads and constructing drains through it. The purchaser, on the other hand, wanted the land in regard to which he entered into the contract to be developed and made ready for building purposes before he could be called upon to complete the purchase. The most material thing was that there was absolutely no time limit within which the roads and the drains were to be made. The war was already on, when the parties entered into the contract. Requisition orders for taking temporary possession of lands for war purposes were normal events during this period. Apart from requisition orders, there were other difficulties in doing construction work at that time because of the scarcity of materials and the various restrictions which the Government had imposed in respect of them. *Held* that having regard to the nature and terms of the contract, the actual existence of war conditions at the time when it was entered into, the extent of the work involved in the development scheme and last though not the least the total absence of any definite period of time agreed to by the parties within which the work was to be completed, it could not be said that the requisition order under R. 79 of the Defence of India Rules vitally affected the contract or made its performance impossible. The events which had happened could not be said to have made the performance of the contract impossible and the contract had not been frustrated at all. *Satyabrata Ghose* v. *Mugneeram Bangur and Co.*, **AIR 1954 SC 44 (49, 50)=1954 SCR 310=1954 SCJ 1.**

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(600) *S. 56—Becomes impossible.*

The word 'impossible' has not been used in the sense of physical or literal impossibility. The performance of an act may not be literally impossible but it may be impracticable and useless from the point of view of the object and purpose which the parties had in view and if an untoward event or change of circumstances totally upsets the very foundation upon which the parties rested their bargain, it can very well be said that the promisor finds it impossible to do the act which he promised to do. *Satyabrata Ghose* v. *Mugneeram Bangur and Co.*, **A I R 1954 S C 44 (46) 1954 S C R 310=1954 S C J 1.**

(601) *S. 56— Contracts for sale of land —(Transfer of Property Act, S. 54.)*

According to the Indian law, which is embodied in S. 54 of the Transfer of Property Act, a contract for sale of land does not of itself create any interest in the property which is the subject-matter of the contract. The obligations of the parties to a contract for sale of land are, therefore, the same as in other ordinary contracts and consequently the doctrine of frustration is applicable to contracts for sale of land in India. *Satyabrata Ghose* v. *Mugneeram Bangur & Co.*, **A I R 1954 S C 44 (49) =1954 S C R 310=1954 S C J 1**

(602) *Ss. 32 and 56 — Contract for supply of cloth bales as soon as they are prepared and supplied by the Mill—Failure to supply within stipulated time—Doctrine of frustration if applies.*

The defendant entered into contract with the plaintiff under which he was to supply 61 bales of cloth of certain specifications manufactured by the New Victoria Mills, Kanpur. The agreement ran as follows: 'We shall continue sending goods as soon as they are prepared to you upto Magsar Badi 15 Sambat 1998 (17-11-47). We shall go on supplying goods to you of the Victoria Mills as soon as they are supplied to us by the said Mill. We shall go on delivering the goods to you upto Magsar Badi 15 out of the goods noted above which will be prepared by the Mill.' As the bales were not supplied the plaintiff sent a telegraphic notice on 20-11-41 to the following effect: 'give delivery of our 61 bales, through Bank. Otherwise suing within 3 days.' The plaintiff did not receive any reply and therefore

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instituted the suit for recovery of the loss sustained by him due to rise in market price. The main defence was that the contract had been frustrated by circumstances beyond their control:

Held that on a true construction of the contract the delivery of the goods was not made contingent on their being supplied to the defendant by the Victoria Mills. The parties never contemplated the possibility of the goods not being supplied at all. The words "prepared by the Mill" were only a description of the goods to be supplied and the expressions "as soon as they are prepared" and "as soon as they are supplied to us by the said Mill" simply indicated the process of delivery. Even apart from the construction of the agreement the defendant having admitted in his evidence that he was in a position to supply the bales of the contracted goods at the time when the breach of contract took place, it could not be held that the performance of the contract had become impossible unless he proved that the failure on his part was due to circumstances beyond his control. The case did not fall within para. 2 of S. 56. Consequently, the doctrine of frustration could not avail the defendant when the non-performance of the contract was attributable to his own default. A I R 1923 P C 54 (2); (1951) 2 All E R 617 and (1916) 2 A C 397, *Rel. on. Ganga Saran* v. *Firm Ram Charan*,

A I R 1952 S C 9
=1952 S C R 36=1952 S C J 799.

(603) *Ss. 50, illustration (d) & 182— Sending of cheque by post on request of creditor—Effect—Post Office if agent of addressee or sender—(Post Office Act (1898), S. 18).*

Under the Indian Post Office Act, 1898, the right of the sender to reclaim the letter until it is delivered to the addressee is by no means an absolute right, for it is left entirely to the authorities to decide whether a letter once posted should be returned to the sender. This very narrow and qualified right can hardly be regarded as bringing about a position so different from that prevailing in England as to make the English decisions laying down the effect of sending cheques by post, wholly inapplicable. On the other hand, the principles underlying the English decisions are clearly consonant with the provisions of Indian law.

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There can be no doubt that as between the sender and the addressee, it is the request of the addressee that the cheque be sent by post that makes the post office the agent of the addressee. After such request the addressee cannot be heard to say that the post office was not his agent and, therefore, the loss of the cheque in transit must fall on the sender on the specious plea that the sender having the very limited right to reclaim the cheque under the Post Office Act, 1898, the Post Office was his agent, when in fact there was no such reclamation. Of course, if there be no such request, express or implied, then the delivery of the letter or the cheque to the post office is delivery to the agent of the sender himself. Apart from this principle of agency there is another principle which makes the delivery of the cheque to the post office at the request of the addressee a delivery to him and that is that by posting the cheque in pursuance of the request of the creditor the debtor performs his obligation in the manner prescribed and sanctioned by the creditor and thereby discharges the contract by such performance.

There is no basic difference in the Indian Post Office Act of 1866 and the Act of 1898 in this respect. The Act of 1898 did not enlarge the right of the sender to reclaim the postal article to such an extent as to nullify illustration (d) to S. 50, Contract Act or otherwise to affect the well-known general principle that a contractual obligation is discharged by the performance of the engagement or promise in the manner prescribed or sanctioned by the promisee. *Commissioner of Income-tax, Bombay South, Bombay* v. *Messrs. Ogale Glass Works Ltd., Ogale Wadi*,

A I R 1954 S C 429
=1954 S C J 577.

(604) *S. 73 — Measure of damages — (Tort—Damages.)*

In the absence of any special circumstances, the measure of damages cannot be the amount of the loss ultimately sustained by the representee. It can only be for the difference between the price which he paid and the price which we would have received if he had resold the shares in the market forthwith after the purchase provided, of course, that there was a fair market then. Ordinarily the market rate of the shares on the date when fraud was practised would

represent their real price in the absence of any other circumstance. If, however, the market was vitiated or was in a state of flux or panic in consequence of the very fact that was fraudulently concealed, then the real value of the shares has to be determined on a consideration of a variety of circumstances, disclosed by the evidence led by the parties — Circumstances indicated. (1903) 1 Ch. 546, *Rel. on. Trojan & Co.* v. *Nagappa*,

A I R 1953 S C 235
= 1953 S C R 789
= 1953 S C J 345.

(605) *S. 73—Measure of damages.*

Question as to what the market value of certain shares would have been at the time of their purchase if all buyers and sellers had information that market was to be closed 3-4 days after that date to enable settlement of outstanding transactions to be effected and had appreciated the effect of that decision — Though question was difficult to answer, difficulty was no ground for refusing to answer. (1903) 1 Ch. 586, *Rel. on. Trojan & Co.* v. *Nagappa*,

A I R 1953 S C 235=1953 S C R 789
=1953 S C J 345.

(606) *S. 73—Interest on damages.*

Interest is allowed by a Court of equity in the case of money obtained or retained by fraud. The agent must also pay interest in all cases of fraud and on all bribes and secret profits received by him during his agency. (1904) A C 817, *Rel. on. Trojan & Co.* v. *Nagappa*,

A I R 1953 S C 235=1953 S C R 789
=1953 S C J 345.

(607) *S. 182—Agent and servant—Distinction—(Master and Servant) — Excess Profits Tax Act (1940), S. 2 (5) — (Hyderabad Excess Profits Tax Regulation, S. 2 (4)).*

The difference between the relations of master and servant and of principal and agent may be said to be this : a principal has the right to direct what work the agent has to do, but a master has the further right to direct how the work is to be done.

An agent is to be distinguished on the one hand from a servant, and on the other from an independent contractor. A servant acts under the direct control and supervision of his master, and is bound to conform to all reasonable orders given him in the course of his work ; an independent contractor, on the other hand, is entirely independent of any control or interference and merely undertakes to produce a specified result, employing his own means to produce that result. An agent though bound to exercise his authority in accordance with all lawful instructions which may be given to him from time to time by his principal, is not subject in its exercise to the direct control or supervision of the principal. An agent, as such is not a servant, but a servant is generally for some purposes his master's implied agent, the extent of the agency depending upon the duties or position of the servant.

Held on facts of the case that the appellant which was a private limited company was the agent and not the servant of the Mills in question. *Lakshminarayan Ram Gopal and Son., Ltd.* v. *Government of Hyderabad through the Commissioner Excess Profits Tax*,

A I R 1954 S C 364 (367).

(608) *S. 182—Commission agent—Contract with — Necessity to ascertain precise terms.*

Per *Mahajan J.* — Contracts with commission agents do not follow a single pattern and the primary necessity in each instance is to ascertain with precision what are the express terms of the particular contract under discussion. *Abdulla Ahmed* v. *Animendra Kissen*, **A I R 1950 S C 15 = 1950 S C J 153=1950 S C R 30.**

(609) *S. 188 — Agent's consent — Sale of Goods Act, S. 30 (2)—Consent.*

The consent of a person, who is acting as agent of the owner, would be as effective as the consent of the owner himself. *Central National Bank, Ltd.* v. *United Industrial Bank Ltd.*,

A I R 1954 S C 181 (185) =1954 S C R 391=1954 S C J 84.

(610) *Ss. 188 and 219—Estate agent — Authority to bind principal by contract of sale commission payable.*

By a letter the appellant was employed by the respondent for arranging the sale of certain premises. The letter ran as follows:

"I do hereby authorise you to negotiate the sale of my property, free from all encumbrances at a price not less than Rs. 1,00,000. I shall make out a good title to the property. If you succeed in securing a buyer for Rs. 1,00,000 I shall pay you Rs. 1,000 as your remuneration. If the price exceeds Rs. 1, 05,000 and does not exceed

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Rs. 1,10,000 I shall pay you the whole of the excess over Rs. 1,05,000 in addition to your remuneration of Rs. 1,000 as stated above. In case you can secure a buyer at a price exceeding Rs. 1,10,000 I shall pay you twenty-five per cent. of the excess amount over Rs. 1,10,000 in addition to Rs. 6,000 as stated above. This authority will remain in force for one month from date" In pursuance of this contract, the appellant found two persons who were ready and willing to purchase the property for Rs. 1, 10,000, and by letters exchanged with them he purported to conclude a contract for the sale of the property and communicated the same to the respondent by a letter. The respondent, however, entered into an agreement with a nominee of the said persons for the sale of the property for Rs. 1, 05,000 and eventually executed a conveyance in their favour. Thereupon, the appellant brought the suit alleging that the contract concluded by him with the purchasers for Rs. 1,10,000 was binding on the respondent and claimed that he was entitled to the payment of Rs. 6,000 as remuneration in accordance with the terms of his employment as he had done all that he was required to do on behalf of the respondent :

Held (Per *Patanjali Sastri J.)* that the letter could not be read as authorising the appellant to conclude a binding contract with the purchaser for the purchase and sale of the property on behalf of the respondent. But the appellant having "negotiated the sale" and "secured buyers" who made a firm offer to buy for Rs. 1,10,000 had done everything he was required by the respondent to do and acquired a right to the payment of commission on the basis of that price which he had successfully negotiated, subject only to the condition that the buyer should complete the transaction of purchase and sale. The condition was fulfilled when those buyers eventually purchased the property in question and the appellant's right to commission on that basis became absolute and could not be affected by the circumstance that the respondent "for some reason" of his own sold the property at a lower price.

Held (Per *Mahajan J.)* that the appellant had authority to enter into a binding contract on behalf of the defendant and he entered into such a contract and thereby

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earned the commission which he claimed in the suit. But even if this construction of the letter was not correct, the appellant earned his commission in full inasmuch as he had secured a buyer who was ready, able and willing to buy the property for Rs. 1,10 000. *Abdulla Ahmed* v. *Anemendra Kissen,*

A I R 1950 S C 15=1950 S C J 153 =1950 S C R 30.

(611) *S. 188—Estate agent—Authority to complete transaction of sale.*

House or estate agent is in a different position from a broker at the stock exchange owing to the peculiarities of the property with which he is to deal which does not pass by a short instrument as stock and shares do but has to be transferred after investigation of title as to which various special stipulations, which might be of particular concern to the owner may have to be inserted in a concluded contract relating to such property. The parties therefore do not ordinarily contemplate that the agent should have the authority to complete the transaction in such cases. *Abdulla Ahmed* v. *Animendra Kissen,*

A I R 1950 S C 15=1950 S C J 153 =1950 S C R 30.

(612) *Ss. 211, 212 & 73 — Commission agent — Breach of duty to insure textile goods purchased for principal — Destruction of goods by explosion—Agent's suit to recover price on basis of indemnity — Counter-claim for damages — Measure of —Counter-claim if barred by S. 18 (2), Bombay Explosion (Compensation) Ordinance (XXXII [32] of 1944).*

Under Ss. 211 and 212, Contract Act, in the case of agent's negligence he is liable to make good the damage directly arising from his neglect but not indirectly or remotely caused by such neglect or misconduct.

The plaintiff, a commission agent in Bombay, purchased a number of bales of textile goods on behalf of his constituent, the defendant and, stored them in a godown in Bombay pending the receipt of necessary permit for consigning the same to the defendant. It was agreed between the parties that the goods were to remain insured against fire risk till their despatch, on usual terms of fire insurance policies prevalent in Bombay. The plaintiff failed to insure the goods even though he had actually charged the insurance premia at the agreed rate against the defendant. The bales were de-

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stroyed on account of a big explosion in the Bombay harbour in 1944. The plaintiff thereupon brought a suit to recover the price of these bales from the defendant on the ground of the agent's right to indemnity. The defendant counter-claimed damages for loss due to negligence of the plaintiff in not insuring the goods. Two months after the explosion the Bombay Explosion (Compensation) Ordinance, 1944, was passed under which the Government was to pay, in respect of uninsured merchandise fifty per cent of the compensation. The plaintiff had recovered that amount of compensation from the Government and had agreed to give credit for the same to the defendant. The dispute was with respect to the remaining fifty per cent. If the goods had been insured by the plaintiff under S. 14 of the Ordinance full compensation would have been recovered by him and become payable to the defendant :

Held (Per *Kania C. J. & Das J*; *Patanjali Sastri J. dissenting*) : — The plaintiff was liable to pay damages by reason of his breach of duty, the measure of damages being the loss suffered by the defendant on account of the goods not being insured. The effect of the Ordinance which came with retrospective effect was merely to substitute a new basis for assessing compensation for the ordinary basis for assessing unliquidated damages. The compensation under the Ordinance was payable on proof of the existence of the insurance policy irrespective of the terms of the policy. The non-recovery of half the amount of the defendant's claim from the Government under the Ordinance because of the absence of fire insurance policy thus directly arose from the neglect of the plaintiff to insure the goods and which in fact he had represented that he had done. The fact that the Ordinance did not exist and could not have been in the contemplation of the parties was irrelevant for deciding the question of liability :

Held further that the counter-claim of the defendant was not barred by S. 18 (2) of the Ordinance inasmuch as he was not claiming to recover the money from the plaintiff otherwise than under S. 18 (1) of the Ordinance. The cause of action for the claim was the plaintiffs' misconduct. It was not for compensation arising from explosion. The quantum of damages was not a part of the cause of action. It was a matter

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to be ascertained by the Court according to well laid down principles. *Firm Pannalal Jankidas* v. *Mohanlal*,

A I R 1951 S C 144
=1951 S C J 149
=1950 S C R 979.

(613) *Ss. 222, 30, 23, 49 — Suit for loss by agent against principal — Place of suit —(Civil P. C., S. 20)—(Defence of India Rules, R. 90-C) — (Forward contracts — Prohibition of).*

A firm A carried on the business of commission agents both at Indore and Jodhpur. B from Jodhpur entered into several forward contracts for the purchase and sale of bullion through the firm at Indore. These transactions proved unprofitable to B and the loss aggregated to a sum of Rupees 21,423-1-6. The entire amount was paid to third parties at Indore by A on behalf of B and A received, in all, a sum of Rupees 11,457-8-0 which B paid from time to time, towards these losses, to A's firm at Jodhpur. A therefore filed a suit in Jodhpur Court to recover the balance with interest. B pleaded '*inter alia*' that the transactions in suit amounted to wagering contract which were illegal according to the Notification dated 3-6-1943 issued under the Defence of India Rules and hence the suit was not maintainable. *Kishan Lal* v. *Bhanwar Lal*,

A I R 1954 S C 500 (502)
=1954 S C J 542.

(614) *Co-owners—Partition—Right to.*

Partition is a right incident to the ownership of property and once the parties are held as co-owners, their right to partition cannot be resisted. *Chhote Khan* v. *Mal Khan*, **A I R 1954 S C 575.**

(614-A) **Corporation.**

(i) A I R 1954 S C 217. *See* under Art. 226, Constitution of India.

(ii) Companies Act.

Co-sharer.

See also, Adverse possession.

(615) Co-sharer — Partition — Right to partition is a right incident to the ownership of property and once the parties are held as co-owners, their right to partition cannot be resisted. *Chhote Khan* v. *Mal Khan*,

A I R 1954 S C 575
=1954 S C J 577.

(616) *Co-sharer — Possession of one becoming adverse to another by ouster — Method by which adverse possession can be broken—(Limitation Act, Art. 144).*

Cotton Control Order (1950)

Once it is held that the possession of a co-sharer has become adverse to the other co-sharer as a result of ouster, the mere assertion of his joint title by the dispossessed co-sharer will not interrupt the running of adverse possession. He must actually and effectively break up the exclusive possession of his co-sharer by re-entry upon the property or by resuming possession in such manner as it is possible to do. A mere mental act on the part of the person dispossessed unaccompanied by any change of possession cannot affect the continuity of adverse possession of the deseizor. It may also check the running of time if the co-sharer who is in exclusive possession acknowledges the title of his co-owner or discontinues his exclusive possession of the property. *Wuntakal Yalpi Chenabasavana Gowd* v. *Rao Bahadur Y. Mahabaleshwarappa*,

A I R 1954 S C 337 (340).

COTTON CONTROL ORDER (1950)

(617) *Cl. 4 — Validity — Does not contravene Art. 19 (1) (g) — Constitution of India, Arts. 19 (1) (g), 19 (5)—(Essential Supplies (Temporary Powers) Act (1946), S. 2 (a)).*

Cotton was listed as an "essential commodity" under S. 2 (a) of the Essential Supplies (Temporary Powers) Act, 1946, so the right of the State to control, and even to prohibit, transactions like 'Hedging' in the cotton trading is evident.

Further, cotton being a commodity essential to the life of the community, it is reasonable to have restrictions which may, in certain circumstances, extend to total prohibition for a time, of all normal trading in the commodity. Accordingly, Cl. 4 of the Cotton Control Order of 1950 does not offend Art. 19 (1) (g) of the Constitution because sub-cl. (5) validates it. *M. B. Cotton Association Limited* v. *Union of India*,

A I R 1954 S C 634.

COTTON TEXTILES (CONTROL OF MOVEMENT) ORDER (1948)

(618) *Cl. 3—Validity of—No arbitrary delegation of power to Textile Commissioner.*

The policy underlying the Order is to regulate the transport of cotton textiles in a manner that will ensure an even distribution of the commodity in the country and make it available at a fair price to all. The

Cotton Textiles (Control of Movement) Order (1948)

grant or refusal of a permit is thus to be exercised in such a way as to effectuate the policy. The conferment of such a discretion to the Textile Commissioner under Cl. 3 of the Order cannot, therefore, be called unregulated or arbitrary and is not invalid on that ground. Further, if there is any abuse of power, there is ample power in the Courts to undo the mischief. *Harishankar Bagla* v. *The State of Madhya Pradesh*,

A I R 1954 S C 465 (468) =1954 S C J 637.

Dwarka Prasad's case, A I R 1954 S C 224, *Disting.*

(619) *Cl. 3—Validity of—Does not contravene Art. 19 (1) (f) and (g) — Constitution of India, Art. 19 (1) (f) and (g).*

Clause 3 of the Control Order does not deprive a citizen of the right to dispose of or transport cotton textiles purchased by him. It requires him to take a permit from the Textile Commissioner to enable him to transport them. The requirement of a permit in this regard cannot be regarded as an unreasonable restriction on the citizen's right under sub-clauses (f) and (g) of Art. 19 (1). If transport of essential commodities by rail or other means of conveyance was left uncontrolled it might well have seriously hampered the supply of these commodities to the public. The contention, therefore, that the clause is invalid as abridging the rights of the citizen under Art. 19 (1) of the Constitution cannot be upheld. *Harishankar Bagla* v. *The State of Madhya Pradesh*,

A I R 1954 S C 465 (467) =1954 S C J 637.

(620) *Cls. 3, 4 — Validity of—No overriding of Ss. 27, 28 and 41 of the Railways Act.*

The Railways Act does not exclude the placing of a disability on a railway administration by the Government or any other authority. The requirement of a permit by Cl. 3 and provisions of Cl. 4 of the Control Order which empower the Textile Commissioner to direct a carrier to close the booking or transport of cloth, apparel, etc. are not in direct conflict with Ss. 27, 28 and 41 of the Railways Act. They merely supplement the relevant provisions of the Railways Act and do not supersede them. The contention, therefore, that these clauses operate as an implied repeal of Ss. 27, 28 and 41 of the Railways Act and

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are invalid on that ground, is not well-founded. *Harishankar Bagla* v. *The State of Madhya Pradesh*,

A I R 1954 S C 465 (469)
=1954 S C J 637.

COURT-FEES ACT (1870)

(621) *Ss. 12 and 5 — Scope of S. 12 — Finality attaches only to valuation and not to category — (Civil P. C. (1908), O. 7, R. 11).*

The provisions of S. 12 have to be read and construed keeping in view the provisions of the Code of Civil Procedure, O. 7, R. 11. There is an apparent conflict between the provisions of the Code of Civil Procedure and the provisions of S. 12, Court-fees Act, which make the order relating to valuation final and efforts to reconcile the provisions of the Court-fees Act, and the Code have resulted in some divergence of judicial opinion on the construction of the section.

The finality declared by S. 12 is limited only to the question of valuation pure and simple and does not relate to the category under which a certain suit falls. *Case law referred.*

The difference in the phraseology employed in Ss. 5 and 12, Court-fees Act, indicates that the scope of S. 12 is narrower than that of S. 5. Section 5 which declares decisions on question of court-fee whenever they arise in the chartered High Courts as final makes a decision as to the necessity of paying a fee or the amount thereof final. Whereas S. 12 makes a decision on every question relating to valuation for the purpose of determining the amount of any fee payable under Chap. 3 on a plaint or memorandum of appeal final.

When the two sections in the same Act relating to the same subject-matter have been drafted in different language, it is not unreasonable to infer that they were enacted with a different intention and that in one case the intention was to give finality to all decisions of the taxing officer or the taxing Judge, as the case may be, while in the other case, it was only intended to give finality to questions of fact that are decided by a Court but not to questions of law. Whether a case falls under one particular section of the Act or another is a pure question of law and does not directly determine the valuation of the suit for purposes of court-fee. The question of determination of valuation or appraisement only arises

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after it is settled in what class or category it falls : 1919 Punj. Re. 16; A. I. R. 1931 Lah. 378; 4 M. L. J. 183 (F. B.), 4 Mad. 204; A. I. R. 1942 Mad. 502; 23 Bom. 486; A. I. R. 1936 Bom. 166; 4 Pat. L. J. 57 and 54 I. C. 733, *Approved. Nemi Chand* v. *The Edward Mills Co. Ltd.*,

A I R 1953 S C 28.

(622) *Sch. II, Art. 17 and S. 7 (iv) (c) —Court-fees on appeal—Additional relief relinquished, the only relief asked being for declaration—Appellate Court cannot throw out appeal on ground that additional relief should have been claimed and court-fee paid thereon—No claim for consequential relief held could be read in claim for declaration.*

A memorandum of appeal, as provided in Art. 1 of Sch. 1, Court-fees Act, has to be stamped according to the value of the subject-matter in dispute in appeal; in other words, the relief claimed in the memorandum of appeal determines the value of appeal for purposes of court-fee. Where the only relief claimed in the memorandum of appeal was for a declaration that the appointment of defendant 2 as managing director of defendant 1 company was invalid and ultra vires and that he has no right to act as chairman and managing director of defendant 1, the relief being purely of a declaratory character, the memorandum of appeal would be properly stamped under Art. 17, Sch. 2. It is always open to the appellant in an appeal to give up a portion of his claim and to restrict it. It is further open to him, unless the relief is of such a nature that it cannot be split up, to relinquish a part of the claim and to bring it within the amount of court-fee already paid. For the purpose of deciding whether the memorandum of appeal was properly stamped according to the subject-matter of the appeal, it is not open to the Court to canvass the question whether the suit with the second prayer for the appointment of a receiver eliminated from it, fell within the mischief of the proviso to S. 42, Specific Relief Act. That is a question which relates to the merits of the appeal and does not concern its proper institution. On this ground, therefore, the Court has no jurisdiction to demand additional fee from the appellant and the appeal cannot be dismissed for failure to meet it. An order demanding additional court-fee on the memorandum of appeal as it stands, that is, minus the

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second prayer, would be erroneous. The claim contained in the first relief to the effect that it be declared that defendant 2 has no right to act as chairman and managing director because of his appointment being illegal, invalid, and ultra vires is a declaration claimed in negative form that defendant 2 has no right to act as chairman and managing director. No claim for a consequential relief can be read within this prayer : 53 Mad. 48; 27 All. 151; A. I. R. 1927 Lah. 543; A. I. R. 1931 Mad. 716; A. I. R. 1929 All. 308 and 47 All. 756, *Rel. on. Nemi Chand* v. *The Edward Mills Co. Ltd.*, **A I R 1953 S C 28.**

(623) *Covenant of the United State of Travancore-Cochin (1949), Art. 20—Sanction under — Disciplinary action against Government servant — (Constitution of India, Art. 311).*

It is only in respect of civil and criminal proceedings that the sanction of the Rajpramukh is required under Art. 20 of the Covenant. The disciplinary proceedings against a Government servant in respect of his misconduct before the Inquiry Commissioner are not criminal proceedings though they partake of the nature of criminal proceedings and hence Art. 20 of the Covenant does not apply to those proceedings : A.I.R. 1953 T.C. 130 (F.B.), *Approved. P. Joseph* v. *State of Travancore-Cochin*,

A I R 1955 S C 160.

C. P. AND BERAR REGULATION OF MANUFACTURE OF BIDIS (AGRICULTURAL PURPOSES) ACT (LXIV [64] of 1948)

(624) *S. 4—Act if ultra vires—Constitution of India, Arts. 13 and 19.*

The Act in imposing total prohibition of carrying on the business of manufacture of bidis during the agricultural season arbitrarily interferes with private business and cannot be said to be reasonable restrictions on the fundamental rights conferred by Art. 19 (1) (g) of the Constitution and therefore, is not saved by Art. 19 (6). That being so it is not in conformity with Part III of the Constitution and is void.

The law even to the extent that it could be said to authorize the imposition of restrictions in regard to agricultural labour cannot be held valid because the language employed is wide enough to cover restric-

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tions both within and without the limits of constitutionally permissible legislative action affecting the right. So long as the possibility of its being applied for purposes not sanctioned by the Constitution cannot be ruled out, it must be held to be wholly void. *Chintamanrao* v. *State of M. P.*

A I R 1951 S C 118 =1950 S C J 571=1950 S C R 759.

CRIMINAL PROCEDURE CODE (1898)

(625) *Ss. 4 (1) (l), 156, 168, 173, 551 and Ch. XIV — Investigation, meaning of —Scheme of Code with regard to investigation explained.*

Under the Code investigation consists generally of the following steps : (1) Proceeding to the spot, (2) Ascertainment of the facts and circumstances of the case, (3) Discovery and arrest of the suspected offender, (4) Collection of evidence relating to the commission of the offence which may consist of (a) the examination of various persons (including the accused) and the reduction of their statements into writing, if the officer thinks fit, (b) the search of places or seizure of things considered necessary for the investigation and to be produced at the trial, and (5) Formation of the opinion as to whether on the material collected there is a case to place the accused before a Magistrate for trial and if so taking the necessary steps for the same by the filing of a charge-sheet under S. 173. The scheme of the Code also shows that while it is permissible for an officer in charge of a police station to depute some subordinate officer to conduct some of these steps in the investigation, the responsibility for every one of these steps is that of the person in the situation of the officer in charge of the police station, it having been clearly provided in S. 168 that when a subordinate officer makes an investigation he should report the result to the officer in charge of the police station. It is also clear that the final step in the investigation, viz., the formation of the opinion as to whether or not there is a case to place the accused on trial is to be that of the officer in charge of the police station. There is no provision permitting delegation thereof but only a provision entitling superior officers to supervise or participate under S. 551. *H. N. Rishbud* v. *State of Delhi*,

A I R 1955 S C 198.

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(626) *S. 5 — 'Any other law' — Contempt proceedings before High Court.*

Contempt is a special subject and the jurisdiction is conferred by a special set of laws peculiar to Courts of Records. The words 'any other law' in S. 5 of the Criminal Procedure Code do not cover contempt of a kind punishable summarily by the High Courts. *Sukhdeo Singh* v. *Hon'ble C. J. S. Teja Singh and the Hon'ble Judges of the Pepsu High Court at Patiala,*

A I R 1954 S C 186 (188) =1954 S C J 67=1954 S C R 454.

(627) *S. 11 — Two appeals in one suit —Dismissal of one — Limitation Act (1908), S. 5.*

From the decree of trial Court in favour of the plaintiff two separate appeals were taken by two sets of the defendants. The appellate Court allowed both the appeals and dismissed the plaintiff's suit by one judgment and ordered a copy of the judgment to be placed on the file of the other connected appeal. Two decrees were prepared. The plaintiffs preferred two appeals, one of the appeals was time barred and on the principle of '*res judicata*' the High Court dismissed both the appeals.

Held, that it was not necessary to file two separate appeals in this case. The question of '*res judicata*' arose only when there were two suits. As there was one suit and both the decrees were in the same case and based on the same judgment and the matter decided concerned the entire suit the principle of '*res judicata*' did not apply. Further, the High Court ought to have given the appellant benefit of S. 5, Limitation Act, as there was conflict of decisions regarding this question. *Case law referred. Narhari* v. *Shanker,*

A I R 1953 S C 419.

(628) *Ss. 14, 197 (2)—Non-exercise of power under S. 197 (2) — Implication.*

There is no reason to think that S. 197 (2) is inspired by any policy of protection of the concerned public servant, as S. 197 (1) is. There can be no question of protection involved by an accused being tried by one Court rather than by another at the choice of the Government. The power under S. 197 (2) appears to be vested in the appropriate Government for being exercised, on grounds of convenience, or the complexity or gravity of the case or other relevant considerations. It cannot be held that it is for the very

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Government which sanctioned the prosecution under S. 197 (1) to specify the Court before which the trial is to be held and no other, that consequently, in a case to which S. 197 (1) applies, the exercise of any power under S. 14 is excluded. If in an individual case, power under S. 197 (2) is not exercised, it cannot under S. 197 (2) be taken that the appropriate Government did not feel called upon to allot the case to any special Court, and it cannot also be taken that such allotment by another Government under S. 14 would affect or nullify the power of the appropriate Government under S. 197 (2). The power to specify a Court for trial in such cases is a permissive power and there can be no such implication, arising from the non-exercise of the power. *M. K. Gopalan* v. *The State of Madhya Pradesh,* **A I R 1954 S C 362 (363).**

(629) *Ss. 14 (1) and 197 (2) — Distinction.*

As regards the respective scopes of the powers under S. 197 (2) and S. 14 the one relates to the Court and the other to the person. Under sub-s. (2) of S. 197, the sanctioning Government may specify a Court for the trial of the case but is not bound to do so. When it does not choose to specify the Court, the trial is subject to the operation of the other provisions of the Code. But even when it chooses to exercise the power of specifying the Court before which the trial is to be held, such specification of the Court does not touch the question as to who is the person to function in such Court before which the trial is to take place. That is a matter still left to be exercised by the Provincial Government of the area where the trial is to take place. The word 'Court' in sub-s. (2) of S. 197, cannot be treated as being the same as a "person" in sub-s. (1) of S. 14. *M. K. Gopalan* v. *The State of Madhya Pradesh,*

A I R 1954 S C 362 (363, 364).

(630) *Ss. 28 and 30 — Scope and effect of.*

The provisions of S. 28 and the second schedule must give way to the provisions of S. 30. The effect of the State Government investing the District Magistrate or any Magistrate of the first class with power under S. 30 is to bring into being an additional Court in which all offences not punishable with death become triable. In other words, the effect of the exercise of

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authority by the State Government under S. 30 is, as it were, to add in the 8th column of the second schedule the Magistrate so empowered as a Court before whom all offences not punishable with death will also be triable. *Budhan Chaudhary* v. *State of Bihar*, **A I R 1955 S C 191.**

(631) *S. 96 (1) — Validity—Issue of Search Warrant if infringes fundamental rights under Art. 19 (1) (f)—Constitution of India, Art. 19 (1) (f) (5).*

A search itself is not a restriction on the right to hold and enjoy property. No doubt a seizure and carrying away is a restriction of the possession and enjoyment of the property seized. This however is only temporary and for the limited purpose of investigation. A search and seizure is therefore, only a temporary interference with the right to hold the premises searched and the articles seized. Statutory regulation in this behalf is a necessary and reasonable restriction and cannot 'per se' be considered to be unconstitutional. The damage, if any, caused by such temporary interference if found to be in excess of legal authority is a matter for redress in other proceedings. Hence no question of violation of Art. 19 (1) (f) is involved where search warrants which purport to be under the first alternative of S. 96 (1) of the Criminal Procedure Code are issued. *M. P. Sharma* v. *Satish Chander*,

A I R 1954 S C 300 (302)
=1954 S C J 428.

(632) *S. 154—First information report not mentioning the names of the accused as assailants—Effect.*

Held on facts that the first information report did not mention the name of any person as assailant, though it was alleged that the names were known, was not of any consequence especially when their names were disclosed at the time of the inquest; that their absence did not indicate that the whole story was subsequently concocted and that the way in which the report was made and taken down indicated a rustic simplicity rather than clear and well planned deceit. *Pandurang* v. *State of Hyderabad*, **A I R 1955 S. C. 216.**

(633) *S. 154 — First information not full—Effect.*

Though the first information report is not as full as it could be, it cannot be ignored altogether. It can be used to corroborate the statements of the eye witnesses. *Abdul Gani* v. *State of Madhya Pradesh*,

A I R 1954 S C 31 (36).

(634) *S. 154—Discrepancy in evidence.*

Where telegram about murder, given almost immediately after the murder was committed, does not mention the names of the assailants, the omission is a strong circumstance in favour of accused. *Wilayat Khan* v. *U. P. State*,

A I R 1953 S C 122.

(635) *S. 154 — Delay in giving first information.*

Murderous assault at place twelve miles distant from Police Station — Victims not dying at once—One of victims husband and the other brother-in-law of informant — In view that informant's first thoughts would have been to tend the victims and also that she had to cover the distance to the police station partly on foot and partly by lorry a report made to the police 6½ hours after the occurrence was held prompt. *Dalip Singh* v. *State of Punjab*, **A I R 1953 S C 364**
=1953 S C J 532.

(636) *Ss. 162, 1 (2) — Applicability of S. 162 to investigations conducted by Bombay City Police prior to and after 1-8-1951 —(Bombay Police Act (22 of 1951), S. 167 (2) and (3)—Effect of) — (Bombay City Police Act (4 of 1902), S. 63).*

Section 167 (3), Bombay Police Act 1951 repealed S. 1 (2) (a) of the Criminal Procedure Code so far as the police in the town of Bombay were concerned with the result that when this Act came into operation with effect from the 1st August 1951 the Bombay City Police were also governed by the provisions of Criminal Procedure Code thus bringing into operation the provisions of S. 162 thereof in the investigations conducted by the Bombay city police.

Section 167 (2), Bombay Police Act, 1951 can only apply to those rights, privileges, obligations or liabilities already acquired, accrued or incurred under the Bombay City Police Act, 1902 before the date of its repeal. An investigation conducted by the police under the provisions of that Act would not create or impose any right, privilege, obligation or liability which can be saved by the provisions of S. 167 (2) of the Bombay Police Act XXII of 1951.

Held that S. 162 of the Criminal Procedure Code applied by reason of the context

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and, the terms of that very section to investigations which had been conducted by the Bombay City Police after the 1st August 1951 and would not have a retrospective operative, because the investigations conducted up to the 1st August 1951 by the Bombay city police would certainly not be investigations conducted "under this Chapter", i.e., Chapter 14 of the Criminal Procedure Code. Hence the question as to admissibility in evidence of the statements made in the course of investigation under the Bombay City Police Act IV of 1902 would have to be considered in the light of the provisions of S. 63 of that Act and not S. 162 of the Criminal Procedure Code. *Ramkrishna* v. *Bombay State*,

A I R 1955 S C 104.

(637) *S. 162—'Statement made to police officer'—Test identification parade—Statement by identifier to punch witness — Admissibility.*

In the case of the test identification parade arranged by the Police and held in the presence of punch witnesses, the statements involved in the process of identification would be statements made by the identifying witnesses to the punch witnesses and would be out-side the purview of S. 162, Criminal P. C. provided the process of identification is carried out under the exclusive direction and supervision of the Punch witnesses and the police had completely obliterated themselves from the parade. But where the test identification is carried out by the police in their presence no distinction can be made between the statements made to the police officers and the statements made to the punch witnesses called by the police officers when conducting the test identification parades.

Where the whole of the identification parades were directed and supervised by the police officers and the Punch witnesses took a minor part in the same and were there only for the purpose of guaranteeing that the requirements of the law in regard to the holding of the identification parades were satisfied :

Held that it could not be said that the statements, if any, involved in the process of identification were statements made by the identifiers to Punch witnesses and not to the police officers as otherwise it will be easy for the police officers to circumvent the provisions of S. 162 by formally asking

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the Panch witnesses to be present and contending that the statements, if any, made by the identifiers were to the Panch witnesses and not to themselves. Hence the test identification parades in regard to accused 4 which were held between the 16th January and 22nd January 1952 attracted the operation of S. 162 and the evidence of identification at those parades was inadmissible against accused 4. *Ramkrishna* v. *Bombay State* **A I R 1955 S C 104.**

(638) *S. 162 — Statement, meaning — Test identification parade — Evidence of identification — Applicability of S. 162— A I R 1941 Mad 675; 1936 Mad W N 177 and A I R 1929 Nag 36, Not approved.*

The process of identification by the identifying witnesses involves the statement by the identifying witnesses that the particular properties identified were the subject-matter of the offence. This statement may be express or implied. The identifier may point out by his finger or touch the property or the person identified, may either nod his head or give his assent in answer to a question addressed to him in that behalf or may make signs or gestures which are tantamount to saying that the particular property identified was the subject-matter of the offence or the person identified was concerned in the offence. All these statements express or implied including the signs and gestures would amount to a communication of the fact of identification by the identifier to another person, such communications are tantamount to statements made by the identifiers to a police officer in the course of investigation and come within the ban of S. 162. The physical fact of identification has thus no separate existence apart from the statement involved in the very process of identification and in so far as a police officer seeks to prove the fact of such identification such evidence of his would attract the operation of S. 162 and would be inadmissible in evidence sought to be given by the identifier himself in regard to his mental act of identification of the accused at the trial. A I R 1943 Cal 644 ; A I R 1952 All 59, *Approved.* A I R 1941 Mad 675; 1936 Mad W N 177 and A I R 1929 Nag 36, *Not approved. Ramkrishna* v. *Bombay State*, **A I R 1955 S C 104.**

(639) *S. 162 — Right of accused to be furnished with copies of statements — Refusal to supply.*

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The right which the accused has got of obtaining copies of the statements made by witnesses during investigation is a very valuable right and that the wholesale refusal to grant the same will be a serious irregularity which would vitiate the entire trial. *Purshottam Jethanand* v. *The State of Kutch* A I R 1954 S C 700 (703)

(640) *S. 162 (1) — Proviso — Right of accused to be furnished with copies—Limitation.*

The statutory right of the accused to be furnished with statements relates to a trial in respect of the very offence which was investigated and does not apply to a trial for a non-cognizable offence in respect of which there has been in fact no investigation. The proviso to S. 162 (1) which gives the right to obtain copies relates to "such inquiry or trial" i.e. to "enquiry or trial of any offence under investigation at the time when the statement was made". *Purshottam Jethanand* v. *The State of Kutch* A I R 1954 S C 700 (702).

(641) *S. 162 — Duty of Court to grant copies —(Hyderabad Penal Code, S. 166).*

The corresponding section of the Hyderabad Penal Code is 166 which is not the same as S. 162. While under S. 162 it is the duty of the Court to direct a copy of the statement of a witness recorded by the police in the course of investigation to be furnished to the accused with a view to enable him to cross-examine such a witness with reference to his previous statement, no such duty is imposed by S. 166 and the matter is left entirely to the discretion of the Court.

An application was made for copies of the statements for re-cross-examination of witnesses which obviously referred to the last stage of the prosecution evidence. The Court ordered that the case diaries and the statements were in Court and the accused's counsel could look into them with a view to help him in the re-cross-examination of the witnesses but if the Court later felt the necessity of furnishing copies, the matter would be considered. No complaint was made before the trial Judge about any prejudice having been caused to the accused by this order, nor was this point taken before the High Court. But in the appeal before the Supreme Court the accused complained that as he was not furnished with the copies of the statements of prosecution witnesses

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recorded by the Police he was hampered in cross-examining the witnesses with reference to their previous statements and therefore had no fair trial.

Held that if he had any legitimate ground for grievance on that score he would have raised it before the High Court and he having not done so there was no substance in the point. *Aftab Ahmad Khan* v. *The State of Hyderabad* A I R 1954 S C 436 (438) =1954 S C J 655.

(642) *Ss. 162, 164—Statement made to persons assisting Police or Magistrate.*

Every statement made to a person assisting the police during an investigation cannot be treated as a statement made to the police or to the Magistrate and as such excluded by S. 162 or S. 164. The question is one of fact and has got to be determined having regard to the circumstances of each case.

Held that on a scrutiny of the evidence of the witnesses and the circumstances under which the statements came to be made by the accused to them the accused was asked by the District Magistrate to make the statements to the witnesses not with a view to avoid the bar of S. 164 or by way of colourable pretence but by way of greater caution particularly having regard to the fact that the accused occupied the position of a Minister of Industries in the State of Vindhya Pradesh. *Shiv Bahadur Singh* v. *State of Vindhya Pradesh,* A I R 1954 S C 322 (333, 334).

(643) *S. 162—Statement by accused to Police.*

Statement of accused made to Police in course of investigation—Statement is inadmissible in evidence under S. 162. *Shiv Bahadur Singh* v. *State of Vindhya Pradesh,* A I R 1954 S C 322 (332).

(644) *S. 162—Bar Councils Act (1926), S. 10 — Misconduct—Disciplinary action.*

In an enquiry under S. 10 (1), Bar Councils Act, an advocate was charged that (1) he asked for and was supplied with a copy of a statement under S. 162, Criminal P. C. of a witness examined by police, even though he was not cited as a witness in the Sessions Court, by misleading the Court into thinking that he was such a witness, and (2) that in a trial for rape, he attempted to put to the prosecutrix some indecent and

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unnecessary questions which were disallowed by the Court. The High Court held that the action of the advocate mentioned in the first charge was a piece of sharp practice unworthy of a member of the Bar amounting to professional misconduct and that the conduct referred to in the second charge reflected on his capacity as a lawyer. He was, therefore, suspended from practice for six months on an appeal to Supreme Court:

Held that regardless of the motive of the Advocate, the Court also had failed to exercise its jurisdiction in not refusing the application in view of the express provisions of S. 162, Criminal P. C. and that the Advocate's conduct in obtaining the copy would not be called a piece of sharp practice justifying suspension from practice.

That with regard to the second charge the subject matter of the questions and the manner in which they were put did suggest that the Advocate exceeded the legitimate bounds of his privilege to some extent. But in view of all the circumstances of the case, the case did not deserve the severe disciplinary action such as suspension from practice for six months and the ends of justice would be served by letting of the advocate with a warning. *Shiv Narain* v. *Judges, Allahabad High Court,*

A I R 1953 S C 368.

—S. 164.

See also A. I. R. 1953 S. C. 459 and A. I. R. 1952 S. C. 159 under Evidence Act.

(645) *S. 164—Confession — Corroboration by evidence prior to confession — Evidence Act, S. 24.*

The contention that a confession can only be corroborated by evidence discovered by the police after a confession has been made and any material that is already in their possession, cannot be put in evidence in support of it, is not valid. A confession can be made even during a trial and the evidence already recorded may well be used to corroborate it. It may be made in the Court of the Committing Magistrate and materials already in possession of the police may well be used for purposes of corroboration. *Hem Raj Devilal* v. *The State of Ajmer,*

A I R 1954 S C 462 (465)
= 1954 S C J 449.

(646) *S. 164 — Confession — Proof of voluntariness — Onus of proof—Evidence Act, S. 24.*

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It is well settled that in order that evidence of a confession by a prisoner may be admissible, it must be affirmatively proved that such confession was free and voluntary and that it was not preceded by any inducement to the prisoner to make a statement held out by a person in authority, or that it was not made until after such inducement had clearly been removed. But a mere bald assertion by the prisoner that he was threatened, tutored or that inducement was offered to him, cannot be accepted as true without more. *Hem Raj Devilal* v. *The State of Ajmer,*

A I R 1954 S C 462 (464)
= 1954 S C J 449.

(647) *S. 164 — Confession recorded in jail—Validity.*

Recording of a confession in jail instead of the court house where it should have been ordinarily recorded is an irregularity.

Held that in the circumstances of the case, the irregularity did not affect the voluntary character of the confessions. *Hem Raj Devilal* v. *The State of Ajmer,*

A I R 1954 S C 462 (464)
=1954 S C J 449.

(648) *Ss. 167 and 344—Constitution of India, Art. 32—Detention without remand.*

Detention of a person in custody after the expiry of remand order, without any fresh order of remand committing him to further custody while adjourning the case under S. 344, Criminal P. C. is illegal. *Ramnarain Singh* v. *State of Delhi,*

A I R 1953 S C 277.

(649) *Ss. 167, 334 — Detention without remand illegal.*

Held, detention of a person in custody after the expiry of remand order, without any fresh order of remand committing him to further custody while adjourning the case under S. 344, Criminal P. C., is illegal. *Ram Narain* v. *State of Delhi,*

A I R 1953 S C 277.

(650) *S. 172 (2)—Use of diary.*

A judge is in error in making use of the police diaries at all in his judgment and in seeking confirmation of his opinion on the question of appreciation of evidence from statements contained in those diaries. The only proper use he could make of these diaries is the one allowed by S. 172. *Habeeb Mohammad* v. *State of Hyderabad,*

A I R 1954 S C 51 (60)
=1954 S C R 475.

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(651) *S. 173 (1) (a)—Contents of police report — First report giving all necessary particulars — Supplementary report naming only formal witnessess — Effect on first report—Criminal P. C., S. 190.*

All that S. 173 (1) (a) requires is that as soon as the police investigation under Chap. 14 is complete, the police should forward to the Magistrate a report in the prescribed form setting forth the names of the parties, the nature of the information and the names of the persons who appear to be acquainted with the circumstances of the case. Where therefore, the first report made by the police to a Magistrate, though called incomplete challan, contains all these particulars and a second report called a supplementary challan is filed subsequently, giving the names of certain witnesses who are merely formal witnesses, the first report is in fact, a complete report as required by S. 173 (1) (a) and it is not necessarily vitiated by the mere fact that a supplementary challan is subsequently filed. *Tara Singh* v. *The State*,

A I R 1951 S C 441
=1951 S C J 518
=1951 S C R 729.

(652) *S. 188, as amended by V. P. Ordinance 15 of 1948 and V. P. Ordinance 27 of 1949—Effect.*

Items 62 and 63 of S. 2 of Ordinance No. 15 of 1948 would seem to indicate that the jurisdiction which the criminal Courts of Vindhya Pradesh previously had to try extra-territorial offences was probably lost thereby. If so, that jurisdiction was restored under Ordinance 27 of 1949 by the amendment thereby of the said Items 62 and 63 thus bringing it into line with S. 188, Criminal P. C., with the requisite adaptations. Hence, the power of the Vindhya Pradesh Courts to hold trials for extra-territorial offences which was probably interrupted from 31-12-1948 was restored on 3-5-1949 with retrospective operation, i. e., as from the date of the prior Ordinance, (i. e. 31-12-1948). *Shiv Bahadur Singh* v. *State of V. P.*,

A I R 1953 S C 394.

(653) *Ss. 190, 193, 195 to 199 and 537 — Scope — Illegality in investigation — Report of police officer based on such investigation —Taking cognizance on such report— Effect on trial — Irregularity if curable under S. 537.*

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A defect or illegality in investigation, however serious, has no direct bearing on the competence or the procedure relating to cognizance or trial. No doubt a police report which results from an investigation is provided in S. 190, Criminal P. C., as the material on which cognizance is taken. But it cannot be maintained that a valid and legal police report is the foundation of the jurisdiction of the Court to take cognizance. Section 190, Criminal P. C. is one out of a group of sections under the heading "Conditions requisite for initiation of proceedings." The language of this section is in marked contrast with that of the other sections of the group under the same heading, i. e., Ss. 193 and 195 to 199. These latter sections regulate the competence of the Court and bar its jurisdiction in certain cases excepting in compliance therewith. But S. 190 does not. While no doubt, in one sense, Clauses (a), (b) and (c) of Section 190 (1) are conditions requisite for taking of cognizance, it is not possible to say that cognizance on an invalid police report is prohibited and is therefore a nullity. Such an invalid report may still fall either under Cl. (a) or (b) of S. 190 (1) and in any case cognizance so taken is only in the nature of error in a proceeding antecedent to the trial. To such a situation S. 537, Criminal P. C. is attracted.

If therefore, cognizance is in fact taken, on a police report vitiated by the breach of a mandatory provision relating to investigation, there can be no doubt that the result of the trial which follows it cannot be set aside unless the illegality in the investigation can be shown to have brought about a miscarriage of justice. That an illegality committed in the course of investigation does not affect the competence and the jurisdiction of the Court for trial is well settled. A I R 1950 P C 26, *Ref.*

Hence, where the cognizance of the case has in fact been taken and the case has proceeded to termination, the invalidity of the precedent investigation does not vitiate the result, unless miscarriage of justice has been caused thereby. *H. N. Rishbud* v. *State of Delhi*, **A I R 1955 S C 196.**

(654) *S. 190 (1) (a) and (b), S. 529— Magistrate in good faith taking cognisance —Defect cured.*

Where a Magistrate of the First Class, though not empowered to do so, takes in-

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good faith cognizance of an offence under S. 190 (1) (a) and (b), the defect in the absence of any prejudice to the accused is cured by S. 529. And further the defect will be held as cured by a bona fide decision given by the Magistrate as to the existence of the power when objection thereto is taken, even assuming without deciding that the "taking of cognizance" was then continuing. *Purshottam Jethanand* v. *The State of Kutch*,

A I R 1954 S C 700 (701).

(655) *Ss. 190, 197—Taking cognizance —What amounts to—Issue of warrant for arrest by Magistrate under S. 3, Prevention of Corruption Act—If amounts to taking cognizance—Prevention of Corruption Act (1947), Ss. 3, 6.*

Before it can be said that any Magistrate has taken cognizance of any offence under S. 190, he must have applied his mind to the offence for the purpose of proceeding in a particular way as indicated in the subsequent provisions of the Chapter—proceeding under S. 200 and thereafter sending it for inquiry and report under S. 202. When the Magistrate applies his mind not for the purpose of proceeding under the subsequent sections of the Chapter but for taking action of some other kind, e.g., ordering investigation under S. 156 (3), or issuing a search warrant for the purpose of the investigation, he cannot be said to have taken cognizance of the offence : AIR (37) 1950 Cal 437, *Approved.*

In the case of a cognizable offence, the Magistrate takes cognizance when the police have completed their investigation, and come to the Magistrate for the issue of a process. In such a case before proceedings are initiated and while the matter is under investigation by the police, the suspected person is liable to be arrested by the police without an order by the Magistrate.

For the Prevention of Corruption Act, offences under Ss. 161 and 165, Penal Code, become cognizable, notwithstanding what is provided in the Criminal P. C.

The proviso to S. 3 of the Act expressly covers the case of a Magistrate issuing a warrant for the arrest of a person in the course of investigation only and on the footing that it is a cognizable offence. The only effect of that proviso is that instead of the police officer arresting on his own motion he has got to obtain an order of the Magistrate for the arrest. It is wrong from

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this feature of S. 3 of the Act alone to contend that because the warrant is issued it must be after the Magistrate has taken cognizance of it and the Magistrate's action can be only under S. 190 of the Criminal P. C.

Reading Ss. 197 and 190 of the Criminal P. C. and S. 6 of the Act in the light of the wording of the proviso to S. 3, it is clear that the stage at which a warrant is asked for under the proviso to S. 3 of the Act is not on cognizance of the offence by the Magistrate as contemplated by the other three sections : 37 Cal 412, *Dist.*; AIR (30) 1943 Pat 245 (SB), *Ref. R. R. Chari* v. *State of U. P.*,

A I R 1951 S C 207
=1951 S C J 302
=1951 S C R 312

(656) *S. 195—Scope of the section.*

Section 195 does not bar the trial of an accused person for a distinct offence disclosed by the same facts and which is not included within the ambit of that section but the provisions of that section cannot be evaded by resorting to devices or camouflages. The test whether there is evasion of the section or not is whether the facts disclose primarily and essentially an offence for which complaint of the Court or of the public servant is required : A I R 1951 Cal 133 (FB) *Affirmed. Basir-ul-Huq* v. *The State of West Bengal*,

A I R 1953 S C 298.

(657) *S. 195—Scope.*

Offences falling under Ss. 182 and 297 of the Penal Code—Accused can be prosecuted for offence under S. 297 without sanction under S. 195, Criminal P. C. *Basir-ul-Huq* v. *The State of West Bengal*,

A I R 1953 S C 298.

(658) *S. 195—Scope.*

Offences falling under Ss. 182 and 500, Penal Code—The ingredients of the offence under S. 182 cannot be said to be the ingredients for the offence under S. 500. Nor can it be said that the offence relating to giving false information relates to the same group of offences as that of defamation. Offence under S. 500 can be tried without sanction under S. 195, Criminal P.C.: A I R 1921 Cal 1 (SB), *Approved. Basir-ul-Huq* v. *The State of West Bengal*,

A I R 1953 S C 298.

(659) *Ss. 195 (3), 476B — Appeal from order of Division Bench of High Court.*

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A right of appeal has been expressly conferred by S. 476-B provided there is a higher forum to which an appeal can be made; and the appellate forum has been designated in an artificial way. The appeal lies to the Court to which the former Court is subordinate within the meaning of S. 195 (3). But "subordinate" does not bear its ordinary meaning. It is used as a term of art and has been given a special meaning by reason of the definition in S. 195 (3); a fiction has been imposed by the use of the word "deemed." Where the former Court is a Division Bench of the High Court the only Court to which an appeal ordinarily lies from the appealable decrees and sentences of a Division Bench of a High Court is the Supreme Court. Therefore, a Division Bench of High Court is a Court "subordinate" to the Supreme Court within the meaning of S. 195 (3); accordingly an appeal lies to the Supreme Court from an order of a Division Bench under S. 476.

Before the Court can apply the definition in S. 195 (3) it has first to see whether there is a class of decrees or sentences in the Court under consideration which are at all open to appeal. If there are not, the matter ends and there is no right of appeal under S. 476-B. If there are, then the Court has to see to which Court those appeals will "ordinarily" lie. It is evident that the only Court to which the appealable decrees and sentences of a Division Bench of a High Court can lie is the Supreme Court. There is no other Court to which an appeal can be made. It follows that that is the ordinary course in the case of all appealable decrees and sentences and that consequently the Supreme Court is the Court to which such appeals will ordinarily lie. *M. S. Sheriff* v. *State of Madras*,

A I R 1954 S C 397 (399).
=1954 S C J 458.

(660) *S. 197—Construction — Dereliction of official duty—Sanction necessity of—(Penal Code (1860), S. 409).*

If S. 197, Criminal P. C. is construed too narrowly it can never be applied, for of course it is no part of an official's duty to commit an offence and never can be. But it is not the duty which the courts have to examine so much as the act, because an official act can be performed in the discharge of official duty as well as in dereliction of it. The sanction has content and its

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language must be given meaning. The courts have to concentrate on the word "offence" in the section. An offence seldom consists of a single act. It is usually composed of several elements and, as a rule, a whole series of acts must be proved before it can be established. Where the elements alleged against the accused a public servant in charge of Government stores are first, that there was an "entrustment" and/or "dominion": second, that the entrustment and/or "dominion" was "in his capacity as a public servant"; third, that there was a "disposal" and fourth that the disposal was "dishonest", it is evident that the entrustment and/or dominion here were in an official capacity, and it is equally evident that there could in this case be no disposal, lawful or otherwise save by an act done or purporting to be done in an official capacity. Therefore, the act complained of, namely the disposal, could not have been done in any other way. If it was innocent, it was an official act; if dishonest, it was the dishonest doing of an official act, but in either event the act was official because the accused could not dispose of the goods save by the doing of an official act namely officially permitting their disposal. Therefore, whatever the intention or motive behind the act may have been, the physical part of it remained unaltered, so if it was official in the one case it was equally official in the other, and the only difference would lie in the intention with which it was done; in the one event, it would be done in the discharge of an official duty and in the other, in the purported discharge of it.

Similarly, where the accused was charged with abetment of offence under S. 409, in that he permitted the disposal of goods by the doing of an official act and thus "wilfully suffer" another person to use them dishonestly, the act of abetment also stands on the same footing. In both cases, the "offence" in his case would be incomplete without proving the official act. In such a case S. 197, Criminal P. C. applies and sanction is necessary, and where there was none the trial is vitiated from the start. *Ramayya* v. *State of Bombay*

A I R 1955 S C 287.

(661) *Ss. 197 and 537—Sanction for prosecution under S. 409, I, P. C. of one accused only, on charge of conspiracy to commit criminal breach of trust, with*

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other accused—Sanction to prosecute both accused under S. 5 (2), Prevention of Corruption Act—Sanction will not cover prosecution of other accused under S. 409, I. P. C.—(Penal Code (1860), S. 409)—(Prevention of Corruption Act (1947), S. 5 (2).)

The Governor General acting under S. 197, Criminal P. C. sanctioned the prosecution of accused 1 for offences under Ss. 120 B, 409, 109, I. P. C. and so forth, for having conspired with the other two accused to commit criminal breach of trust in respect of the properties entrusted in their custody and for having abetted the commission of that offence, and also for having committed it. Similar sanction was not given against the other two accused. The sanction for these offences was limited to accused 1. On the same date sanction was also given for the prosecution of accused 1 under S. 5 (2), Prevention of Corruption Act, before it was amended in 1952 and a similar sanction was given against accused 2. Trial for offence under S. 5 (2) Prevention of Corruption Act, was separated from trial under S. 409, I. P. C. The question was whether this sanction against accused 2 for prosecution under S. 5 (2) could be extended to cover his prosecution under S. 409, I. P. C.

Held that under S. 197, Criminal P. C. the Governor General was at that date the sanctioning authority; under the Prevention of Corruption Act the sanctioning authority was the "Central Government" By virtue of subsequent amendment by Act 59 of 1952 and the Criminal Law Amendment Act (46 of 1952), the trials under these two provisions have different procedures and different punishments. Thus there was a choice not only of forum, but also of procedure and the extent of the maximum penalty. If two separate authorities were given the right to choose and neither could encroach upon the preserve of the other, then the Governor General had not sanctioned the prosecution under S. 409, I. P. C. against accused 2 and no other authority had the power to do so. Therefore, in that event, the sanction given to prosecute under S. 5 (2), could not be used to cover the trial under S. 409, I. P. C. because it was given by another authority not competent to give it.

Held also if the two authorities were really one, then the election had been made clearly and unequivocally. The sanction

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was to proceed in the special courts with the special procedure and accused 2 was not to be exposed to the risk of the higher penalty under S. 409, I. P. C. In that event, the trial against accused 2 under S. 409, I. P. C. was incompetent. *Ramayya* v. *State of Bombay*, A I R 1955 S C 287.

(662) *S. 197—Sanction—Essentials of.*

The lacuna, if any, in the sanction of the kind contemplated by the decision in A. I. R. 1948 P. C. 82 can be remedied in the course of the trial by specific evidence in that behalf. *M. K. Gopalan* v. *The State of Madhya Pradesh*, A I R 1954 S C 362 (363).

(663) *S. 197—Prosecution on charges of conspiracy and bribery— Ss. 120-B and 161, Penal Code.*

Sanction under S. 197 is not necessary for instituting proceedings against a public servant on charges of conspiracy and of bribery. *Ronald Wood Mathams* v. *State of West Bengal.* A I R 1954 S C 455 (457).

(664) *Ss. 208, 209 and 342—Statement of accused — Value of.*

The statements of an accused person recorded under Ss. 208, 209 and 342 are among the most important matters to be considered at a trial. It has to be remembered that in this country an accused person is not allowed to enter the box and speak on oath in his own defence. This may operate for the protection of the accused in some cases but experience elsewhere has shown that it can also be a powerful and impressive weapon of defence in the hands of an innocent man. The statements of the accused recorded by the Committing Magistrate and the Sessions Judge are intended in India to take the place of what in England and in America he would be free to State in his own way in the witness-box. They have to be received in evidence and treated as evidence and be duly considered at the trial (Ss. 287 and 342).

This means that they must be treated like any other piece of evidence coming from the mouth of a witness and matters in favour of the accused must be viewed with as much deference and given as much weight as matters which tell against him. Nay more. Because of the presumption of innocence in his favour even when he is not in a position to prove the truth of his story, his version should be accepted if it

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is reasonable and accords with probabilities unless the prosecution can prove beyond reasonable doubt that it is false. *Hate Singh* v. *State of M. B.*,

A I R 1953 S C 468.

(665) *S. 209 (1) — Committal proceedings — Scope of Magistrate's enquiry.*

In a committal proceedings all that the Magistrate has to consider is whether under S. 209 (1) there are sufficient grounds for committing the accused for trial and not whether, on an appreciation of the whole evidence and other material in the case, including witnesses for the defence, the charge against him is proved. *Tara Singh* v. *The State*, **A I R 1951 S C 441 =1951 S C J 518=1951 S C R 729.**

—S. 221.

See A. I. R. 1954 S. C. 359, under Prevention of Corruption Act.

(666) *Ss. 225 and 537 — Imperfect charge — Effect.*

A mere imperfection in the charge cannot be used to overthrow a conviction unless prejudice can be shown. The irregularity is curable both under Ss. 225 and 537. *Moti Das* v. *The State of Bihar*,

A I R 1954 S C 657 (659).

(667) *Ss. 225 and 537 — Vagueness of charge—Effect — (Penal Code (1860), S. 420).*

Where in a trial for an offence of cheating the charge does not specify the manner and the mode in which the cheating has been done, it is vague, but the vagueness of the charge is only an irregularity not vitiating the trial unless the accused is materially prejudiced thereby.

Thus, where the particulars and details were all on the record before the charges were framed and the accused could not have been misled in any way and, in fact, no grievance was made by him or his Advocate on that score before the trial Court, the irregularity complained of cannot be held to have caused any real prejudice to the accused and does not vitiate the trial. *Damodram* v. *State of Travancore-Cochin*,

A I R 1953 S C 462.

(668) S. 227 — Alteration of charge — Prosecution under S. 52, Income-tax Act— Charge can be altered to one under S. 51 (c) of that Act. *Shamrao* v. *Dominion of India*, **A I R 1955 S C 249.**

(669) *Ss. 227 and 439 — Alteration of charge in revision.*

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In revision a direction to alter the charge so as to include an offence for which the accused was not originally charged can be given only if the trial Court itself could take action under S. 227 and it could only do so if there were materials before it either in the complaint or in the evidence to justify such action. *Harihar* v. *The State of West Bengal*,

A I R 1954 S C 266 (267).

(670) *S. 233 — Accused charged under S. 302 read with S. 149, I. P. C. — He cannot be convicted under S. 302 when he was acquitted of S. 302 read with S. 149— Curability of defect — (Criminal P. C. (1898), Ss. 535, 537) — (Penal Code (1860), Ss. 149 and 302).*

A charge for a substantive offence under S. 302 or S. 325, I. P. C., is for a distinct and separate offence from that under S. 302 read with S. 149 or S. 325, read with S. 149. A person charged with an offence read with S. 149 cannot be convicted of the substantive offence without a specific charge being framed as required by S. 233, Criminal P. C. A wrong conviction under S. 302/34 cannot be converted into one under S. 302. A. I. R. 1954 S. C. 204, *Distinguished.* ; 34 Cal. 698 ; A. I. R. 1915 Cal. 292, *Approved.* ; 47 Mad. 746 : A. I. R. 1925 Mad. 1 : 25 Cri. L. J. 1297 (F. B.) ; 9 All. 645 : 1887 All W. N. 149 and 7 Pat. 484 : A. I. R. 1928 Pat. 454 : 29 Cri. L. J. 648, OVERRULED.

If there is a conviction for a charge not framed it is an illegality and not an irregularity curable by the provisions of Ss. 535 and 537, Criminal P. C.

Held, that assuming, however, for a moment that there was merely an irregularity which was curable, in the circumstances of the present case, the irregularity was not curable because the appellant was misled in his defence by the absence of a charge under S. 302. By framing a charge under S. 302, read with S. 149, I. P. C., against the appellant, the Court indicated that it was not charging the appellant with the offence of murder and to convict him for murder and sentence him under S. 302, I. P. C. was to convict him of an offence with which he had not been charged. In defending himself the appellant was not called upon to meet such a charge and in his defence he may well have considered it unnecessary to concentrate on that part of

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the prosecution case. (Retrial under S. 232, Criminal P. C., ordered.) *Nanak Chand* v. *State of Punjab*, **A I R 1955 S C 274.**

(671) *Ss. 233 and 235 — Joint charges and joint trials.*

Section 233 embodies the general law as to the joinder of charges and lays down a rule that for every distinct offence there should be a separate charge and every such charge should be tried separately. There is no doubt that the object of S. 233 is to save the accused from being embarrassed in his defence if distinct offences are lumped together in one charge or in separate charges and are tried together but the legislature has engrafted certain exceptions upon this rule contained in Ss. 234, 235 and 239.

The prosecution case against the accused, a Reserve Inspector of Police, was that he came on a visit to 'R' and took into custody two persons without any reason and then proceeded to 'K'. Seeing some persons outside the latter village he shot at them. One of them fell down and the others fled. The accused chased these others caught two of them and brought them back and on seeing the person who had fallen down still alive shot him dead. He stayed the night at village 'K'. There he released two of the persons on the intercession of some people but kept the other two in wrongful confinement until the morning and released them only on one of them paying him a certain sum of money. He was charged with offences of murder, extortion and wrongful confinement.

Held, that the incidents related in the evidence left no manner of doubt that from the moment the accused started from the Police Station, he committed a series of acts involving killing, injuring people unlawfully confining others and extorting money from one of them. As the series of acts attributed to the accused constituted one transaction in which the offences were committed the case fell squarely within the purview of S. 235. The fact that the offence of extortion was committed at a different place and at a different time did not anytheless make the act as one committed in the course of the same transaction and therefore the misjoinder of the alleged distinct offences of murder, extortion and wrongful confinement was permitted by the exception contained in S. 235. Therefore no question of contravention of any express provision of

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the Code such as S. 233 arose and in the circumstances it was not necessary to consider how far the contravention of any express provision constituted an illegality which vitiated the trial as distinguished from an irregularity curable under S. 537. *Aftab Ahmad Khan* v. *The State of Hyderabad*, **A I R 1954 S C 436 (438, 439) =1954 S C J 655.**

(672) *Ss. 234, 233 and 4 (1) (o) — 'More offences than one' — Firing of single shot at two persons — Only one offence is committed.*

Where the accused is charged with attempt to murder two persons by firing a single shot at them, the charge cannot be said to be in respect of two offences but is a charge in respect of only one offence for purposes of S. 234, Criminal P. C.: 1881 All W N 154 (2), 14 Cri L J 219 (Cal.), 3 Cri L J 111 (Cal.), 13 Cal 270 and A I R (20) 1933 Cal 354, *Approved*. *Bhagat Singh* v. *The State*, **A I R 1952 S C 45 =1952 S C R 371=1952 S C J 26.**

(673) *S. 235 — Misjoinder of charges — Legality of trial — Writ under Art. 32, Constitution of India.*

Misjoinder of charges is a defect in the procedure followed at the trial and it does not mean that the trial Court acted without jurisdiction. There is a basic difference between want of jurisdiction and an illegal or irregular exercise of jurisdiction. The defect, if any, can according to the procedure established by law be corrected only by act of appeal or revision. Where the appellate Court which was competent to deal with the matter has pronounced its judgment against the petitioners the matter having been finally decided is not one to be reopened in a proceeding under Art. 32 of the Constitution. *Janardhan Reddy* v. *State of Hyderabad*, **A I R 1951 S C 217 =1951 S C J 320 =1951 S C R 344.**

(674) *Ss. 236 and 237—No doubt about facts and of offence if allegations proved —Sections have no application.*

Section 237 is entirely dependent on the provisions of S. 236. The provisions of S. 236 can apply only in cases where there is no doubt about the facts which can be proved but a doubt arises as to which of several offences have been committed on the proved facts in which case any number of charges can be framed and tried or alternative

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charges can be framed. In these circumstances if there had been an omission to frame a charge, then under S. 237, a conviction could be arrived at on the evidence although no charge had been framed. Where there is no doubt about the facts and if the allegations against the accused that he caused injuries to the deceased was established, there could be no doubt that offence of murder had been committed, there is no room for the application of S. 236. *Nanak Chand* v. *State of Punjab*,

A I R 1955 S C 274.

(675) *Ss. 236 and 237 — Charge of murder — Conviction for offence under S. 201, Penal Code — Legality — Penal Code (1860), Ss. 302 and 201.*

Where a person is acquitted of the charge of murder and other cognate charges, with which he is charged, his conviction under S. 201, Penal Code, without any further charge is not illegal: A I R 1925 P C 130, *Rel. on. Kashmira Singh* v. *State of Madhya Pradesh*,

A I R 1952 S C 159
=1952 S C R 526=1952 S C J 201.

(676) *S. 237 — Conviction for offence not charged.*

Where the accused is charged under S. 307, Penal Code, he may be convicted under S. 326, even in the absence of charge in respect of it, if on the facts of the case he could be charged alternatively under Ss. 307 and 326, Penal Code: A I R 1925 P C 130, *Rel. on. Bejoy Chand* v. *State of West Bengal*, A I R 1952 S C 105
=1952 S C R 202=1952 S C J 17.

(677) *S. 252 — Material witness — Duty of prosecution—Inference from non-examination — (Evidence Act, S. 114).*

It is the bounden duty of the prosecution to examine a material witness, particularly when no allegation has been made that, if produced, he would not speak the truth. Not only does an adverse inference arise against the prosecution case from his non-production as a witness in view of illustration (g) to S. 114 of the Evidence Act, but the circumstances of his being withheld from the Court casts a serious reflection on the fairness of the trial. *Habeeb Mohammad* v. *State of Hyderabad*,

A I R 1954 S C 51 (56)
=1954 S C R 475.

(678) S. 256 (1) — No opportunity to produce relevant evidence afforded to defence—Conviction arrived at without affording such opportunity—When no opportunity has been afforded to accused for producing relevant evidence in defence, conviction cannot be sustained. *Hateeb Mohammad* v. *State of Hyderabad*,

A I R 1954 S C 51 (61)
=1954 S C R 475.

(679) *S. 257 — Refusal to issue process for examination of witnesses.*

Although the evidence on record may tend to establish a strong case against the accused, he is entitled to rebut and if certain documents would furnish good material for rebutting that case, the Court, by declining to issue process for the examination of the witnesses connected with those documents, would deprive the accused of an opportunity of rebutting it. The accused cannot be convicted without an opportunity being given to him to present his evidence and if it is denied to him there is no fair trial and conviction cannot stand. It is essential that rules of procedure designed to ensure justice should be scrupulously followed, and Courts should be jealous in seeing that there is no breach of them. *Ronald Wood Mathams* v. *State of West Bengal*,

A I R 1954 S C 455 (457).

(680) *S. 257 (1)—Documents required by accused reported to be destroyed — Procedure.*

Where the documents required by the accused for his defence are reported to be destroyed or not available by the officers concerned, the Court is not called upon to make investigation into the question whether the replies from different officers as to what documents were destroyed or were not available were correct or not. It is open to the counsel for the accused whenever any such report came, to challenge the statement and at that stage the court might ask the prosecution to support their replies by affidavits or otherwise. *Habeeb Mohammad* v. *State of Hyderabad*,

A I R 1954 S C 51 (60)
=1954 S C R 475.

(681) *S. 258 (1) — He shall record an order for acquittal.*

Once a charge is framed and the accused is found not guilty of that charge an acquittal must be recorded under S. 258 (1); there is no option in the matter. *Harihar* v. *The State of West Bengal*,

A I R 1954 S C 266 (267).

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(682) *S. 269 — Notification revoking previous notification granting trial by Jury — Revocation in respect of accused in particular cases only — Notification is void — Notification is also bad under Art. 14 — Classification is not based on substantial distinction — That cases involve mass of evidence is no basis of classification—(Constitution of India, Art. 14).*

Though the trial by Jury is undoubtedly one of the most valuable rights which the accused can have, it has not been guaranteed by the Constitution. Section 269 (1) of the Code of Criminal Procedure is an enabling section and empowers the State Government to direct that the trial of all offences or of any particular class of offences before any Court of Session shall be by jury. It has the further power to revoke or alter such an order. There is nothing wrong if the State discontinues trial by jury in any district with regard to all or any particular class of offences, but the question is whether it can direct that the trial of a particular case or of a particular accused shall be in the Court of Session by jury while in respect of other cases involving the same offence the trial shall be by means of assessors. The section does not empower the State Government to direct that the trial of a particular case or of a particular accused person shall be by jury while the trial of other persons accused of the same offence shall not be by jury. The section does not take notice of individual accused or of individual cases. It only speaks of offences or of a particular class of offences, and does not direct its attention to particular cases or classes of cases, and it does not envisage that persons accused of the same offence but involved in different cases can be tried by the Court of Session by a different procedure, namely, some of them by jury and some of them with the help of assessors.

The ambit of the power of revocation or alteration is co-extensive with the power conferred by the opening words of the section and cannot go beyond those words. In exercise of the power of revocation also the State Government cannot pick out a particular case or set of cases and revoke the notification qua these cases only and leaves cases of other persons charged with the same offence triable by the Court of Session with the aid of jury.

Where the notification altering the previous notification granting right of trial by jury, refers to accused persons in a particular case and the cases of others involving the same offence are excluded and are still triable by Court of Session by jury, in other words what the notification does is that it denies to certain individuals the right to be tried by jury while retaining that right in the case of other individuals who have committed the same or similar offences, the notification travels beyond the power conferred on the State Government by S. 269 (1) of the Code of Criminal Procedure, and is thus void and inoperative. The notification is also bad as it contravenes the provisions of Art. 14 of the Constitution.

It is well settled that though Art. 14 is designed to prevent any person or class of persons for being singled out as a special subject for discriminatory legislation, it is not implied that every law must have universal application to all persons who are not by nature, attainment or circumstances, in the same position, and that by process of classification the State has power of determining who should be regarded as a class for purposes of legislation and in relation to a law enacted on a particular subject; but the classification, however, must be based on some real and substantial distinction bearing a just and reasonable relation to the objects sought to be attained and cannot be made arbitrarily and without any substantial basis.

Where the notification revokes the right of trial by jury in respect of certain cases only and not in respect of certain offences and in express terms, has not indicated the grounds on which this set of cases has been segregated from other set of cases falling under the same sections of the Indian Penal Code, the classification has no relation to the object in view, that is, the withdrawal of jury trial in these cases. There can be mass of evidence in the case of persons accused of the same offences in other cases or sets of cases. The mere circumstance of a mass of evidence, and the suggestion that owing to the length of time the jurors might forget what evidence was led before them furnishes no reasonable basis for denying these persons the right of trial by jury.

The memory of jurors, assessors, judges and of other persons who have to form their judgment on the facts of any case, can afford no reasonable basis for a classifi-

cation and for denial of equal protection of the laws. Similarly, the quantum of evidence in a particular case can form no reasonable basis for classification and thus can have no just relation to the object in view. *Dhirendra Kumar* v. *Superintendent and Remembrancer of Legal Affairs to the Government of West Bengal*,

A I R 1954 S C 424 (426, 427) = 1954 S C J 582.

(683) *Ss. 284 and 537 — From the persons summoned to act as such.*

Where out of the three assessors summoned to act as such, one was absent on the date of hearing and the Court thereupon ordered another person who was on the list of assessors to act instead without going through the formality of issuing a summons to him the defect is a mere irregularity which is curable under S. 537 when there is no failure of justice and the trial cannot be held to be bad on that account: A. I. R. 1938 Pat. 352, *Approved*. *Magga* v. *State of Rajasthan*,

A I R 1953 S C 174=1953 S C R 973 = 1953 S C J 253.

(684) *Ss. 284 and 285—Scope.*

The effect of Ss. 284 and 285 is that a trial cannot be validly commenced with less than three assessors chosen in the manner prescribed by the Code, but once validly commenced it can be continued in certain cases to a finish if some, though not all, of the persons originally appointed, attend throughout the trial. If all of them do not attend then a fresh trial has to be held. An addition in the number of the assessors or a change or substitution in their personnel during the course of the trial is not warranted by the Code; on the other hand, it is implicitly prohibited. The procedure prescribed by S. 285 (1) is not of a permissive nature. It has to be followed if the conditions prescribed are fulfilled, and like S. 285 (2) it is of a mandatory character. No scope is left in these provisions for the exercise of the discretion of the Judge for supplementing these provisions and for holding a trial in a manner different from the one prescribed and for conducting it with the aid of some assessors originally appointed, and also with the aid of some others recruited during the trial. *Magga* v. *State of Rajasthan*,

A I R 1953 S C 174=1953 S C R 973 = 1953 S C J 253.

(685) *Ss. 284, 285 and 537—Shall proceed with the aid of other assessor or assessors.*

The Code does not authorize a trial commenced with the aid of three named assessors to be conducted and completed with the aid of four assessors. The substitution of one assessor by another and an addition to the number of assessors appointed at the commencement of the trial is not sanctioned by S. 285, Criminal P. C., nor is it authorized by S. 284. On the other hand, the language of S. 285 (1) read with S. 285 (2) implicitly bans the holding of such a trial. It is not possible to say with any degree of certainty to what extent the opinion of the outgoing and the incoming assessors who did not attend the whole of the trial influenced the decision in the case: but as such a trial is unknown to law, it has to be presumed that it was illegal and no question can arise of curing any irregularity under S. 537 : 25 Mad. 61 (P. C.); A. I. R. 1927 P. C. 44 and A. I. R. 1947 P. C. 67, *Applied*. *Magga* v. *State of Rajasthan*,

A I R 1953 S C 174=1953 S C R 973 = 1953 S C J 253.

(686) *Ss. 285 and 537—'It is not practicable to enforce his attendance.'*

It is no doubt true that S. 285 enjoins on the Judge a duty to find whether there is a sufficient cause for the non-attendance of an assessor and whether it is not practicable to enforce his attendance and ordinarily the proceedings must represent on their face whether this duty has been performed but such an omission on his part does not necessarily vitiate the trial. When a Judge proceeds with a trial in the absence of one or two of the assessors with the aid of the remaining assessor or assessors, it may be presumed that he has done so because he was satisfied that it was not practicable to enforce the attendance of the absent assessor or assessors and that there was sufficient cause for his or their non-attendance, unless there is evidence to a contrary effect. Failure to record an order indicating the reasons for proceeding with the trial with the aid of the remaining assessors can at best be an irregularity or an omission which must be held to be such as to come within the reach of S. 537 unless it has in fact

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occasioned a failure of justice. *Magga* v. *State of Rajasthan*,

A I R 1953 S C 174
=1953 S C R 973=1953 S C J 253.

(687) *S. 286—Practice—Duty of prosecution.*

A Reserve Inspector of Police in the State of Hyderabad was accused of having committed the offence of murder and extortion while on a visit to a village. Direct evidence of the offence was produced in the case. But the accused denied the offence and stated that he had not left the headquarters on the crucial date and contended that it was the duty of the prosecution to produce his attendance register for the relevant period in order to put the matter beyond doubt. It was found that the register containing the entries for the relevant period had been destroyed during the police action:

Held that it was not any part of the duty of the prosecution to produce such evidence particularly when direct evidence of the offence had been produced. *Aftab Ahmad Khan s/o Hakim Mohamad Yar Khan* v. *The State of Hyderabad*,

A I R 1954 S C 436 (438)
=1954 S C J 655.

(688) *S. 286 — Prosecution evidence — Omission to examine some witnesses — Effect.*

It is no doubt very important that, as a general rule, all Crown witnesses should be called to testify at the hearing of a prosecution, but there is no obligation compelling counsel for the prosecution to call all witnesses who speak to facts which the Crown desire to prove. Ultimately it is a matter for the discretion of counsel for the prosecution and though a Court ought, and no doubt will, take into consideration the absence of witnesses whose testimony would be expected, it must adjudge the evidence as a whole and arrive at its conclusion accordingly taking into consideration the persuasiveness of the testimony given in the light of such criticism as may be levelled at the absence of possible witnesses. *Abdul Gani* v. *State of Madhya Pradesh*,

A I R 1954 S C 31 (36).

(689) *S. 288 — Sessions trial — Prosecution witness turning hostile—His previous statements — Evidentiary value — (Evidence Act (1872), Ss. 145, 157).*

Out of four eye-witnesses 'A,' 'B,' 'C' and 'D' produced by the prosecution in a Sessions

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trial. 'A' and 'B' supported the prosecution, 'C' supported it in the examination-in-chief but resiled in cross-examination and was treated as hostile. 'D' turned hostile from the start. 'C' and 'D' were cross-examined by the prosecution. His previous statement in committal proceedings was put to 'C' who admitted to have made it. The Court relied for conviction on the testimony of 'A' and 'B' and other facts and also referred to the previous statements of 'C' and 'D.' It was objected that the evidence of 'C' and 'D' was not legally admissible as the formalities under S. 288, Criminal P. C. were not observed and hence the conviction was vitiated:

Held that (1) the use of the evidence of 'C' and 'D' did not make any difference as the evidence of 'A' and 'B' which was believed by the Judge was sufficient to afford a basis for conviction and the mere fact that extraneous matter not necessary for conviction was also called in aid would not affect the result.

(2) That the lower Court had not used the former statement of 'C' as substantive evidence but merely as corroboration of what was said by him in chief examination.

(3) Further that though the former statement could not be used as substantive evidence it could be used as corroboration of the evidence in chief under S. 157 of the Evidence Act or to shake the witness's credit or test his veracity under S. 146. Section 145 is not called into play at all in such a case as resort to S. 145 would only be necessary if the witness denies that he made the former statement. When the witness admits the former statement all that is necessary is to look to the former statement of which no further proof is necessary.

(4) Thus in the case of 'C' the prosecution had a choice because of two conflicting versions given in chief and in cross-examination. It was entitled to use the former statement either to contradict what was said in cross-examination or to corroborate what was said in chief. In either event, S. 288, Criminal P. C. could be used to make the former statement substantive evidence because what the section says is "subject to the provisions of the Indian Evidence Act," and not subject to any particular section in it. Section 157 is as much a provision of the Indian Evidence Act as S. 145 and if the former statement can be brought in under S. 157, it can be transmuted into substan-

tive evidence by the application of S. 288. A I R 1951 S C 441, *Disting.*

(5) That as 'D' was hostile from the start no question of corroboration arose and his former statement was used only for contradiction by complying with the formalities of S. 145, Evidence Act. *Bhagwan Singh* v. *State of Punjab*,

A I R 1952 S C 214
=1952 S C R 812=1952 S C J 284.

(690) *S. 288—'Subject to provisions of Evidence Act' — Expression whether excludes S. 145, Evidence Act.*

There is no reason why S. 145, Evidence Act, should be excluded when S. 288 states that the previous statements are to be "subject to the provisions of the Indian Evidence Act." Section 145 falls fairly and squarely within the plain meaning of these words. More than that. This is a fair and proper provision and is in accord with the sense of fairplay to which Courts are accustomed. On giving effect to the plain meaning of these words, therefore, the evidence in the Committal Court cannot be used in the Sessions Court unless the witness is confronted with his previous statement as required by S. 145, Evidence Act. If the prosecution wishes to use the previous testimony to the contrary as substantive evidence, then it must confront the witness with those parts of it which are to be used for the purpose of contradicting him. Then only can the matter be brought in as substantive evidence under S. 288. *Tara Singh* v. *The State* **A I R 1951 S C 441**
=1951 S C R 729=1951 S C J 518.

(691) *S. 297—Non-direction— Prosecution under S. 409, I. P. C. in that accused disposed of Government stores and received price—Jury asked to disbelieve evidence as to receipt of price — Non-direction in the matter of evidence of motive.*

In a case under S. 409, I. P. C. the prosecution case was that the accused disposed of the Government goods to *M* for a sum of Rs. 4000/- which was duly paid to accused 2. The trial Judge told the jury that—"the evidence led by the prosecution about the payment of Rs. 4000 is proved to be utterly useless," and in telling them why, he gave them a number of reasons. But he omitted to follow this up by telling them that if they rejected this part of the prosecution case, as he invited them to do, then the strongest part of the case against the accused collapsed because officers in the position of the accused did not commit illegal acts like this and expose themselves to a prosecution and possible disgrace unless they were prompted by some strong motive, usually self interest, and though a conviction can be based on evidence which does not disclose a motive if the facts proved justified such a course, yet it would ordinarily be unsafe to convict in a case like this in absence of proof indicating an adequate reason for criminal behaviour on the part of the accused.

Held that there was non-direction which might have caused a miscarriage of justice. Had the jury been told that in the absence of evidence of motive, it would not be safe to convict the accused, it was possible that they would not have returned a verdict of guilty. *Ramayya* v. *State of Bombay*,

A I R 1955 S C 287.

(692) *S. 297—Misdirection.*

Case of dacoity — Summing up to jury with regard to evidence relating to number of persons who took part in dacoity—Judge after discussing evidence of each witness pointing out main defects and contradictions in their evidence and stating that the witnesses were all definite that there were five or more men concerned in the attack and in the commission of dacoity — Judge further directing the jury that if they found on scrutiny of the evidence that there were at least five men conjointly concerned then only S. 395, Penal Code would apply—Held on facts that there was no misdirection to the jury so as to vitiate their unanimous verdict of guilty under S. 395, Penal Code. *Ramkrishna* v. *Bombay State*,

A I R 1955 S C 104.

(693) *S. 297—Summing up the evidence for the prosecution and defence— Duty of Judge.*

Under S. 297, Criminal P. C., the Judge has to lay down the law and direct the jury on questions of law. So far as the facts are concerned however they are within the exclusive province of the jury. But even there the Judge has to sum up the evidence for the prosecution and defence. Summing up does not mean that the Judge should give merely a summary of the evidence. He must marshall the evidence so as to bring out the lights and the shades, the probabilities and the improbabilities so as to give proper assistance to the jury who are requir-

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ed to decide which view of the facts is true. A I R 1934 Cal 847, *Ref. to.*

The Judge should give the jury the help and guidance which they are entitled to expect from the Judge and which it is his duty to give. The charge should not consist of a long rambling repetition of the evidence, without any attempt to marshall the facts under appropriate heads, or to assist the jury to sift and weigh the evidence so that they will be in a position to understand which are the really important parts of the evidence and which are of secondary importance. It is necessary in every criminal case for the Judge carefully, properly and efficiently to charge the jury and he should not go into unnecessary details with regard to such aspects of the case which are really of very little importance. AIR 1914 P C 116; AIR 1936 Cal 186, *Ref. to. Ramkrishna* v. *Bombay State,* **A I R 1955 S C 104.**

(694) *S. 297—Misdirection.*

The admission of inadmissible evidence would amount to a misdirection in the judges' charge to the jury. *Ramakrishna* v. *State of Bombay,* **AIR 1955 S C 104.**

(695) *Ss. 423 (2), 297 and 537—Verdict of jury—Interference—Misdirection owing to admission of inadmissible evidence — Powers and duty of appellate Court—(Evidence Act (1872), S. 167).*

In cases where inadmissible evidence has been admitted and has been incorporated in the Judge's charge to the jury the appellate Court has to exclude the inadmissible evidence from the record and consider whether the balance of evidence remaining thereafter is sufficient to maintain the conviction. It is for the Court of Appeal to take the whole case into consideration and determine for itself whether the verdict pronounced by the jury was justified or whether there had been in fact a failure of justice. The Court of appeal is thus entitled to examine the evidence for itself and to substitute its own verdict for the verdict of the jury if on examining the record for itself it comes to the conclusion that the verdict of the jury was erroneous or that there has been a failure of justice in the sense that a guilty man has been acquitted or an innocent man has been convicted. A I R 1946 P C 82; A I R 1953 S C 282; AIR 1943 Cal 644 and A I R 1949 Cal 514, *Ref. to.*

Held that even excluding the evidence of the test identification parades in regard to

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the fourth accused the balance of evidence remaining on record was enough to maintain his conviction. *Ramakrishna* v. *State of Bombay* **AIR 1955 S C 104.**

(696) *S. 297 — Misdirection — Jury asked to solve problem by resorting to speculative reasoning.*

After putting the six different versions of the prosecution case before the jury, the Judge directed the jury : "Now, gentlemen, this is a jigsaw puzzle kept before you. In jigsaw puzzles all the pieces are kept before us and we have to use our ingenuity and piece them together. Some links are missing in this case. However as rightly submitted by the learned Assistant Public Prosecutor, in such cases you have to weigh the probabilities of the case and therefore you have to find out from the material before us whether you can solve this jigsaw puzzle." In the concluding part of the charge the Judge said: "After weighing the probabilities of the case, evidence on record, as prudent men, if you come to the conclusion that the story given by the prosecution does not appear to be probable and that the accused must not have committed the offence, then in that case you have to return a verdict of not guilty" :

Held that the Judge clearly misdirected the jury when he asked it to solve the problem that had arisen by exercising its ingenuity and by resorting, if necessary, to speculative reasoning. In other words, the Judge gave the jury *a carte blanche* to come to its conclusion on the basis of its own conjectures, if necessary. Not only that, he told the jury to hold the accused not guilty in case it found it improbable that he must not have committed the offence. These propositions placed before the jury were repugnant to all notions of criminal jurisprudence and they must necessarily have had affected its mind in arriving at the conclusion. *Mushtak Hussein* v. *The State of Bombay,* **A I R 1953 S C 282.**

(697) *S. 307 — Verdict of jury when would be set aside.*

On a reference under S. 307, the High Court will only interfere with the verdict of the jury if it finds the verdict "perverse in the sense of being unreasonable," manifestly wrong" or "against the weight of evidence." If the facts and circumstances of the case are such that a reasonable body of men could arrive at the one conclusion or the other, it

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is not competent to the Sessions Judge or the High Court to substitute their verdict in place of the verdict which has been given by the jury. The jury are the sole judges of the facts and it is the right of the accused to have the benefit of the verdict of the jury. Even if the Sessions Judge or the High Court would if left to themselves have arrived at a different verdict it is not competent to the Sessions Judge to make a reference nor the High Court to accept the same and substitute their own verdict for the verdict of the jury provided the verdict was such as could be arrived at by a reasonable body of men on the facts and circumstances of the case. AIR 1946 P C 151, *Foll.*

Held on the facts and circumstances of the case that there were enough materials before the jury which would enable it to come to one conclusion or the other in regard to the criminality of the accused. Six out of the nine jurors came to the conclusion that the accused was not guilty of the offence with which he was charged. Three out of the nine jurors came to an opposite conclusion and it was impossible in the circumstances of the case to characterise the one or the other of the conclusions reached by the members of the jury as perverse in the sense of being unreasonable or manifestly wrong or against the weight of evidence. The verdict reached by the majority was certainly a verdict which upon the evidence on record a reasonable body of men could have reached. *Akhlakali* v. *State of Bombay,* **A I R 1954 S C 173 =1954 S C R 435 =1954 S C J 90.**

(698) *S. 309—Judge not bound to conform to opinion of assessors.*

The provision in S. 309 of the Code that the opinions of the assessors are not binding on the Sessions Judge cannot lend support to the contention that the Sessions Judge is entitled to ignore their very existence. Though he may not be bound to accept their opinions, he is certainly bound to take them into consideration. The weight to be attached to such opinions may well vary with the number of assessors. *Magga* v. *State of Rajasthan,* **A I R 1953 SC 174=1953 S C R 973 =1953 S C J 253.**

(699) *Ss. 337, 342—Tender of pardon—Discharge—Formal order—Necessity of.*

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The accused admitted before the District Magistrate that the confessional statement made by him at Bombay a copy of which was read over to him was voluntarily made by him and that he accepted it as a true statement of all that transpired in connection with the conspiracy and also about the murder and disposal of the dead body of the deceased. The District Magistrate thereupon passed the order that it was a fit case for tendering pardon to him under S. 337 (1) : *Held,* that the moment the pardon was tendered to the accused he must be presumed to have been discharged whereupon he ceased to be an accused and became a witness. It could not therefore be said that before tendering the pardon to him he had not been discharged and consequently his evidence as an approver was not legally admissible. *A. J. Peiris* v. *State of Madras,* **A I R 1954 S C 616 (620).**

(700) *S. 337 (1), Proviso, S. 338—Scope.*

By S. 338 power is no doubt given after the commitment to the Court to which the commitment is made to tender pardon, before judgment is passed, to any person supposed to have been directly or indirectly concerned with any offence or order the Committing Magistrate or the District Magistrate to tender pardon during the trial of the case but it does not take away the power conferred under the proviso to S. 337 (1). The proviso contains an additional provision which empowers the District Magistrate to tender pardon where the offences are under inquiry or trial. *A. J. Peiris* v. *State of Madras,* **AIR 1954 S C 616 (620).**

(701) *S. 340 — Hyderabad Cr. P. C., S. 271—Capital case — Accused unrepresented—Effect.*

The provision of S. 340 (corresponding to S. 271, Hyderabad Cr. P. C.) be construed liberally in favour of the accused and must be read along with the rules made by the High Courts and the circular orders issued by them enjoining that where in capital cases the accused has no means to defend himself, a counsel should be provided to defend him. The proper view seems to be : (1) that it cannot be laid down as a rule of law that in every capital case where the accused is unrepresented, the trial should be held to be vitiated; and (2) that a Court of appeal or revision is not powerless to interfere, if it is found that the accused was so

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handicapped for want of legal aid that the proceedings against him may be said to amount to negation of a fair trial. *Janardhan Reddy* v. *State of Hyderabad*,

A I R 1951 S C 217=1951 S C J 320 =1951 S C R 344.

(702) *S. 340 (1) — Right of accused— Nature of.*

The right conferred by S. 340 (1) does not extend to a right in an accused person to be provided with a lawyer by the State or by the police or by the Magistrate. That is a privilege given to him and it is his duty to ask for a lawyer if he wants to engage one and to engage one himself or get his relations to engage one for him. The only duty cast on the Magistrate is to afford him the necessary opportunity. *Tara Singh* v. *The State*. A I R 1951 S C 441 =1951 S C J 518 =1951 S C R 729.

(703) Circumstances appearing against accused should not be considered unless opportunity is given to accused for explaining them in his examination under S. 342. *Zwinglee Ariel* v. *State of Madhya Pradesh*,

A I R 1954 S C 15 (18, 19)

(704) *S. 342—Statement under—Use of.*

With reference to the statement of the accused under S. 342, Criminal P. C., it is true that if it is sought to be used as an admission it must be read as a whole, but where it consists of distinct and separate matters, there is no reason why an admission contained in one matter should not be relied on without reference to the statements relating to other matters. *Karnall Singh* v. *State of Punjab*,

A I R 1954 S C 204 (206) =1954 S C R 904 =1954 S C J 269.

(705) *S. 342 — Non-examination of accused on circumstances appearing against them—No prejudice—No retrial.*

The fact that the accused were not questioned on these matters and the fact that there was no reference to these circumstances appearing against them in their examination under S. 342, Criminal P. C. was a serious irregularity which could not be lightly ignored: if prejudice was thereby caused, such an irregularity would entail retrial in the circumstances of a case like this. But before a retrial could be ordered the Court must be clearly satisfied about

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prejudice having been caused. *Kedar Nath Bajoria* v. *The State of West Bengal*,

A I R 1954 S C 660 (679).

(706) *S. 342—"Question him generally on the case."*

It is not sufficient compliance with the section to generally ask the accused that having heard the prosecution evidence what he has to say about it. He must be questioned separately about each material circumstance which is intended to be used against him. The questions must be fair and must be couched in a form which an ignorant or illiterate person will be able to appreciate and understand. *Ajmer Singh* v. *State of Punjab*,

A I R 1953 S C 76.

(707) *S. 342 — Non-compliance with section.*

Every error or omission not in compliance with the provisions of S. 342 does not necessarily vitiate a trial. Errors of this type fall within the category of curable irregularities, and the question whether the trial is vitiated depends upon the degree of the error and upon whether prejudice has been or is likely to have been caused to the accused. *Ajmer Singh* v. *State of Punjab*,

A I R 1953 S C 76.

(708) *S. 342—Answers given to be taken into consideration.*

Conviction of the accused cannot be based merely on his statement recorded under S. 342 which cannot be regarded as evidence. But where the prosecution evidence disclosed that the godown was in the possession and charge of the accused and the accused in his examination under S. 342 admitted that he was in charge of the godown, whereupon no further evidence was led on the point, the Magistrate was justified in referring to the statement of the accused under S. 342 as supporting the prosecution case concerning the possession of the godown. *Vijendrajit* v. *State of Bombay*,

A I R 1953 S C 247 =1953 S C J 328.

(709) *S. 342—Nature of Examination contemplated — (Evidence Act (1872), S. 18).*

Where the accused in his examination under S. 342 admitted that he was in charge of the godown but denied that the rectified spirit was found in that godown and alleged that it was found outside godown the statement concerned itself with two facts, the

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latter of which was proved untrue by prosecution evidence and had no intimate connection with the statement concerning the possession of the godown. The statement was not inculpatory and part exculpatory. *Vijendrajit* v. *State of Bombay*,

A I R 1953 S C 247
=1953 S C J 328.

(710) *S. 342—Circumstances appearing against accused.*

Trial Court and High Court attaching importance to the fact that accused had absconded—Accused should have been asked question on this point and given a chance to explain it—In the absence of this, the fact cannot be used against him. *Hate Singh* v. *State of M. B.*,

A I R 1953 S C 468.

(711) *S. 342—Non-compliance with the section—Effect.*

It is not sufficient for the accused merely to show that he has not been fully examined as required by S. 342, but he must also show that such examination has materially prejudiced him. *Bejoy Chand* v. *State of West Bengal*,

A I R 1952 S C 105
=1952 S C R 202
=1952 S C J 17.

(712) *S. 342 — Nature of questions to be put — Non-compliance with provisions of section — Effect.*

The importance of observing faithfully and fairly the provisions of S. 342 cannot be too strongly stressed. It is not a proper compliance to read out a long string of questions and answers made in the Committal Court and ask whether the statement is correct. A question of that kind is misleading. In the next place, it is not sufficient compliance to string together a long series of facts and ask the accused what he has to say about them. He must be questioned separately about each material circumstance which is intended to be used against him. The whole object of the section is to afford the accused a fair and proper opportunity of explaining circumstances which appear against him. The questioning must therefore be fair and must be couched in a form which an ignorant or illiterate person will be able to appreciate and understand. Even when an accused person is not illiterate, his mind is apt to be perturbed when he is facing a charge of murder. He is therefore in no fit position to understand the significance of a complex question. Fairness therefore requires that each material circumstance should be put simply and separately in a way that an illiterate mind, or one which is perturbed or confused, can readily appreciate and understand.

Every error or omission in this behalf does not necessarily vitiate a trial because the errors of this type fall within the category of curable irregularities. Therefore, the question in each case depends upon the degree of the error and upon whether prejudice has been occasioned or is likely to have been occasioned. *Tara Singh* v. *The State*, A I R 1951 S C 441 = 1951 S C R 729 = 1951 S C J 518.

(713) *S. 342 (1) — 'Appearing in the evidence against him' — Meaning.*

When the Sessions Court is required to make the examination under S. 342, the evidence referred to is the evidence in the Sessions Court and the circumstances which appear against the accused in that Court. It is not therefore enough to read over the questions and answers put in the Committing Magistrate's Court and ask the accused whether he has anything to say about them. Moreover the evidence recorded in the Committal Magistrate's Court is not as full and as complete as the evidence recorded in the trial before the Sessions Judge. Accordingly, it often happens that evidence is given in the Sessions Court and facts are disclosed which do not appear on the record of the Committing Magistrate. If the Judge intends to use these against the accused, it is clearly not enough to question him about matters which occurred in the Committal Court:

Held, that merely asking the accused in the Sessions Court whether the statements made before the Committing Magistrate and his answers given there were correctly recorded, or omission to examine the accused on points appearing in the evidence given before the Sessions Judge amounts to non-compliance with the requirements of S. 342, which vitiates the trial if prejudice occurs or is likely to occur. *Tara Singh* v. *The State*, A I R 1951 S C 441 = 1951 S C J 518 = 1951 S C R 729.

(714) *Ss. 342 & 537 — Disregard of provisions of S. 342 — Trial vitiated.*

The accused was tried and convicted of murder of his brother by strangulation. The only relevant evidence against him was that of his wife which was believed. The

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examination of the accused under S. 342 was perfunctory in the committal as well as in the Sessions Court and he was not asked any question relating to the circumstances appearing in the evidence against him. Some of the questions asked were in the nature of cross-examination. The evidence of the wife recorded in the committal Court had been transferred to the file of the Sessions Court without duly complying with the provisions of S. 288, Criminal P. C. The High Court, however, had her evidence recorded but the accused was not questioned afresh with regard to this additional evidence.

Held that in the circumstances the disregard of the provisions of S. 342, Criminal P. C., had resulted in grave prejudice to the accused vitiating the trial. *Bihari Singh Madho Singh* v. *State of Bihar*,

A I R 1954 S C 692 (693).

(715) *S. 360 — Failure to read out deposition—Effect — Certificate of reading out endorsed on deposition — Denial of witness—Burden of proof—(Evidence Act (1872), S. 80).*

Even if the fact be true that the deposition was not read over that would only amount to a curable irregularity. A. I. R. 1927 P. C. 44, Relied on.

Where the certificate of the Committing Magistrate endorsed on the deposition sheet states that the deposition was read out to the witness and that the witness admitted it to be correct, the Court is bound to accept it as correct under S. 80, Evidence Act, until it is proved to be untrue. The burden is on the person seeking to displace the statutory presumption and if he chooses to rely on the testimony of a witness which the Court is not prepared to believe the matter ends there. The duty displacing the presumption lies on the person who questions it. The Court is of course bound to consider such evidence as is adduced but it is not bound to believe such evidence nor is there any duty whatever on the Court to conduct an enquiry on its own. *Bhagwan Singh* v. *State of Punjab*

A I R 1952 S C 214 = 1952 S C R 812 = 1952 S C J 284.

(716) *S. 367 — Circumstantial evidence — Tests.*

Where there was no direct evidence as to who of the two persons suspected, one of whom was the accused, murdered the deceased, an old woman of 70, and the facts established showed that the accused had opportunity and also a strong motive to do away with the old woman, that he was insistent on cremating the corpse as early as possible when he was being prevented from doing so.

Held that the conduct of the accused far from establishing his innocence certainly showed that he was aware of the manner in which the old woman had met with her death and was most anxious to dispose of the body so as to avert any suspicion or proof of her having met with an unnatural death as it was finally found by the civil surgeon on a post mortem examination of the dead body and that (agreeing with the High Court) the prosecution succeeded in establishing the guilt of the accused. *Kutuhal Yadav* v. *State of Bihar*,

A I R 1954 S C 720 (723).

(717) *S. 367 — Circumstantial evidence — Essentials.*

Where there is no direct evidence one way or the other and the whole case turns on circumstantial evidence, the circumstantial evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence. The only two persons who could have been responsible for the forgeries and the embezzlement of the moneys were the Appellant and the peon. If the peon could be shown not to have committed the forgeries and embezzled the moneys the only person who could have done so was the Appellant himself. It was in evidence that the peon only knew Hindi and it was not shown that he knew the English language or ever wrote anything in English but on the other had the Appellant was an experienced officer in Govt. service for a period of over 17 years, knew English, maintained all the records in English and was familiar with the English language and the forgeries were in English language. Held that there could not be any doubt that the peon was certainly not capable of forging the documents and if at all there was anybody who could have done so both in regard to the capacity as well as the opportunity of so doing the Appellant himself was the only person who committed the forgeries. *Mangleshwari Prasad* v. *State of Bihar*, **A I R 1954 S C 715 (718, 719).**

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See also Ram Bharosey v. State of Uttar Pradesh, A. I. R. 1954 S. C. 704 (705).

(718) *S. 367 and Evidence Act, S. 53—Circumstantial evidence — Nature of, required for conviction.*

Roof of a godown belonging to the accused was requisitioned by the Government for the use of the military. During the occupation by the military, the accused had repeatedly complained to the authorities that the roof was being damaged by the military authorities by the way in which it was being used, that as a consequence of it the roof had begun to leak and that the jute belonging to the accused which was stored underneath the roof, in the godown was being spoiled. After the premises were de-requisitioned and handed over to the accused, the accused laid claim to compensation and damages. The claim was scrutinized by the Government Officer and the claim for the reduced amount was sanctioned and paid to the accused. The gravamen of the prosecution case was that the allegations of damage to the roof by misuse of the military as well as the allegation of collapse thereof were absolutely false, fraudulent and collusive and that there had been deliberate misrepresentation in this behalf, while it was the defence case that these allegations were substantially true and that there was no question of any misrepresentation, fraud or collusion. In the view of the High Court, the evidence did not disclose that any damage to the roof worth the name was caused by the occupying military and the subsequent conduct of the accused was such as to lead to a reasonable and necessary inference that the claim in this respect was fraudulent and the result of a conspiracy. There was no specific evidence, in the nature of contemporaneous reports or the like as to the condition of the roof (when it was taken over by the military authorities from the accused and (2) when it was handed back by them to the accused nor was there any direct evidence about the actual kind of use to which it was being put by the Government during this period:

Held (i) that in the absence of direct evidence the conclusions had to be necessarily formed with reference to the assertions and counter-assertions in the correspondence between the accused and the Govt. and the subsequent conduct of the parties. The offences charged had therefore,

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to be brought home to the accused in the light of the principles laid down by A. I. R. 1952 S. C. 343 as applicable to such cases. Before a person could be found guilty with reference to mere circumstantial evidence, each of the circumstances relied upon must be clearly established and the proved circumstances taken together must be such as reasonably to exclude the probability of innocence.

(ii) that taking all the features together, the circumstances actually made out fell far short of establishing any dishonesty or fraud in respect of damage to the roof. There might be room for suspicion that the claim was rather over-rated and that one of the accused who recommended the claim and on whose recommendation it was sanctioned was accommodating. But this was no substitute for proof of dishonesty and fraud.

(iii) that as regards the claim for compensation in respect of the alleged damages to the stock of jute stored within the godown, there was reason to think, on the evidence in the case (apart from any subsequent circumstances) that the claim had been very much inflated without any basis or foundation, though the occurrence of some damage might be true and that the question then was whether the circumstances brought forward relating to this portion of the case were such as to lead to a clear inference that this claim was fraudulent and the result of a conspiracy.

(iv) that there were definite and clinching circumstances against the accused which led to a reasonable and necessary conclusion that the claim put forward by them for compensation in respect of the alleged damage to the jute had been deliberately and fraudulently bolstered up, and was the result of a mutual arrangement. *Kedar Nath Bajoria* v. *The State of West Bengal*, A I R 1954 S C 660 (666, 674, 675, 679).

(719) *S. 367—Doubt as to identity and number of accused.*

Unless a mistaken identity is suggested or where the circumstances shut out any reasonable possibility of mistaken identity then the hesitation with respect to conviction on the part of the Judge can only be ascribed, not to any doubt about identity of the accused but to a doubt about the number taking part in the commission of crime.

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This proposition has no application where in very firm language a finding has been given that a particular number of persons took part in the crime. *Marachalil Pakku* v. *State of Madras*,

A I R 1954 S C 648 (651).

(720) *S. 367—Appreciation of evidence —Considerations.*

Where the question was who was responsible for embezzlement, whether the officer or the accused who was his clerk, the Court cannot apply one standard in appreciating evidence against the accused and another against the officer. That the officer is unlikely to commit offence because that would ruin his position and his career, is a consideration applicable as well to the clerk. *Bhagat Ram* v. *State of Punjab*,

A I R 1954 S C 621 (626, 629).

(721) *S. 367—Appreciation of evidence —Inference.*

Held, on facts that the very fact that the defence was given out at such an early stage and that it has, to such a large extent, been corroborated is a strong reason for thinking that the defence was very likely to have been true. *Bhagat Ram* v. *State of Punjab*,

A I R 1954 S C 621 (628).

(722) *S. 367—Circumstantial evidence —Appreciation—(Evidence Act, S. 53).*

In a case depending on the conclusions drawn from circumstances it is well settled that the cumulative effect of the circumstances must be such as to negative the innocence of the accused and to bring the offences home to him beyond any reasonable doubt.

Held that the defence put forward by the accused cannot be said to have been disproved or to be so improbable that his guilt must be taken to have been established beyond reasonable doubt.

That the Courts below in taking the contrary view failed to keep in mind the fundamental rule relating to the proof of guilt based on circumstantial evidence and proceeded on conjectures in a case where statedly the circumstances were more or less equally balanced. *Bhagat Ram* v. *State of Punjab*,

A I R 1954 S C 621 (626, 628, 629).

(723) *S. 367—Reasons for decision.*

It is the obvious duty of the Court to give a summary of the evidence of material witnesses and to appraise the evidence with a view to arriving at the conclusion whether the testimony of the witness should be believed.

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The practice which is fairly general in Hyderabad of writing judgments containing copious quotations verbatim from evidence of witness without the Judges' full and detailed comment upon the evidence as might be expected was held not commendable. *Aftab Ahmad Khan, s/o Hakim Mohamad Yar Khan* v. *State of Hyderabad*,

A I R 1954 S C 436 (440) =1954 S C J 655.

(724) *S. 367—Appreciation of evidence —Witness related to complainant—Nature of—Corroboration required.*

The corroboration that is required in the case of the testimony of a witness who is the relation of the deceased in a murder case is not what would be necessary to support the evidence of an approver but what would be sufficient to lend assurance to the evidence before the Court and satisfy the Court that the particular persons were really concerned in the murder of the deceased. *Karnall Singh* v. *State of Punjab*,

A I R 1954 S C 204 (206) =1954 S C R 904=1954 S C J 269.

(725) *S. 367—Appreciation of evidence —Duty of Court.*

Though the prosecution witnesses have not told the whole truth and though it is not possible to get an absolutely true picture of the events from their evidence, where it is not possible to say that the prosecution case is a complete fabrication and where it appears that certain murders have resulted from a riot in which some at least of the several accused have taken part, the Court should make an effort to disengage the truth from the falsehood and to sift the grain from the chaff. It is an error to take an easy course of holding the evidence discrepant and the whole case untrue. Of course, the story given by the eyewitnesses has to be carefully scrutinized and unless it can be said with reasonable certainty that a certain person took part in the riot, the benefit of doubt has to be given to him. *Abdul Gani* v. *State of Madhya Pradesh.*

A I R 1954 S C 31 (34, 35).

(726) *S. 367—Appreciation of evidence —(Evidence Act (1872), S. 1).*

That the witnesses are women and that the lives of a number of accused depend on their testimony is not a valid reason for

saying that corroboration is necessary to act on their evidence. *Dalip Singh* v. *State of Punjab*,

A I R 1953 S C 364
=1953 S C J 532.

(727) *S. 367— Appreciation of evidence —(Evidence Act (1872), S. 1).*

A witness is normally considered to be independent unless he or she springs from sources which are likely to be tainted and that usually means that unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily a close relative would be the last person to screen the real culprit and falsely implicate an innocent person and hence the mere fact of relationship far from being the foundation for criticism of the evidence is often a sure guarantee of truth. No doubt no sweeping generalisation can be possible in all cases but at the same time there cannot be any general rule of prudence to require corroboration before the evidence is believed. Each case must be limited to and governed by its own facts.

A Judge in a particular case can, for special reasons to that case and the witness, say that he is not prepared to believe him unless corroborated because of his general unreliability or for other reasons but unless there are such special facts he cannot do so on a supposedly general rule of prudence enjoined by law, as in the case of accomplices A I R 1952 S C 54, *Rel. on. Dalip Singh* v. *State of Punjab*,

A I R 1953 S C 364
=1953 S C J 532.

(728) *S. 367 — Appreciation of evidence —Circumstantial evidence—Duty of Court.*

In dealing with circumstantial evidence the rules specially applicable to such evidence must be borne in mind. In such cases there is always the danger that conjecture or suspicion may take the place of legal proof. In cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words,

there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused. *Hanumant* v. *State of M. P.*,

A I R 1952 S C 343
=1952 S C R 109=1952 SCJ 509.

(729) *S. 369—'Judgment' —Interpretation of — Appeal heard by Division Bench —Death of Judge who prepared judgment before its delivery — Other judge cannot validly deliver judgment — Letters Patent (All), Cls. 20 & 27).*

A judgment is the final decision of the Court intimated to the parties and to the world at large by formal 'pronouncement' or 'delivery' in open Court. It is a judicial way. The decision which is so pronounced or intimated must be a declaration of the mind of the Court as it is at the time of pronouncement. This is the first judicial act touching the judgment which the Court performs after the hearing. Everything else up till then is done out of Court and is not intended to be the operative act which sets all the consequences which follow on the judgment in motion. The final operative act is that which is formally declared in open Court with the intention of making it the operative decision of the Court. That is what constitutes the judgment". Up to the moment, the judgment is delivered judges have the right to change their mind. Therefore however much a draft judgment may have been signed beforehand, it is nothing but a draft till formally delivered as the judgment of the Court. It follows that the judge who 'delivers' the judgment, or causes it to be delivered by a brother Judge, must be in existence as a member of the Court at the moment of delivery so that he can, if necessary, stop delivery and say that he has changed his mind. There is no need for him to be physically present in Court but he must be in existence as a member of the Court and be in a position to stop delivery and effect an alteration should there be any last minute change of mind on his part. Where, therefore, of the two Judges of the High Court who hear an appeal in a criminal case, one, purporting to write a joint judgment, prepares a judgment, signs it and sends it to the other Judge but before

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it is delivered dies, then the judgment if delivered by the other Judge, is not a valid judgment. *Surendra Singh* v. *State of Uttar Pradesh*,

A I R 1954 S C 194 (196, 197) =1954 S C R 330=1954 S C J 12.

(730) S. 376 and Art. 134 (1) (c) Constitution of India — Sentence of death confirmed by judicial commissioner — Certificate for appeal to Supreme Court granted ipso facto—Not an adequate ground. *Kalawati* v. *Himachal Pradesh State*,

A I R 1953 S C 131 =1953 S C R 546=1953 S C J 144.

(731) *S. 402—Capital sentence— Delay in execution — Commutation of sentence —Facts to be taken into consideration.*

It is true that in proper cases an inordinate delay in the execution of the death sentence may be regarded as a ground for commuting it. But this is no rule of law and is a matter primarily for consideration of the local Government. If the Court has to exercise a discretion in such matters the other facts of each case will have to be taken into consideration.

Note.—In this case it was held that the murder was a cruel and a deliberate one and there was no extenuating circumstance whatsoever which would justify the Supreme Court in ordering a commutation of the death sentence. *Nawab Singh* v. *State of Uttar Pradesh*,

A I R 1954 S C 278 (279).

(732) *S. 403 (2)—"Any distinct offence" —Previous trial under S. 7, Essential Supplies (Temporary Powers) Act — Subsequent trial under Ss. 332 and 392, Penal Code— S. 403, sub-s. (2) applies and not sub-s. (1).*

The export of certain essential supplies such as rice and ghee was prohibited from Madhya Pradesh to another State and any person contravening the prohibition was guilty of an offence under S. 7, Essential Supplies (Temporary Powers) Act, 1946. Three bullock-carts belonging to the appellants and carrying bags of rice and tins of ghee were crossing a river on the Madhya Pradesh and Uttar Pradesh border. A Head Constable, on receiving information, reached the spot, seized the prohibited goods and brought the carts back to a place in Madhya Pradesh. When they reached the jungle near that place the two appellants were alleged to have beaten the Head Constable

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and taken away the property seized. They were accordingly charged under Ss. 332 and 392, I. P. C., for voluntarily causing hurt to public servant in the discharge of his duty as such public servant and also for robbing him of the goods seized by him and convicted. It was contended that the appellants were already prosecuted for an offence under S. 7, Essential Supplies (Temporary Powers) Act, 1946, for exporting the contraband goods and although they were convicted by the Magistrate they were acquitted on appeal by the Additional Sessions Judge, and that under S. 403 (1), Criminal P. C., the appellants who had once been tried for the offence and acquitted could not be tried against for the same offence nor on the same facts for any other offence for which a different charge from the one made against them might have been made under S. 236 or for which they might have been convicted under S. 237 :

Held, that neither S. 236 nor S. 237 applied and that sub-s. (2) of S. 403 furnished a complete answer to the contention raised on behalf of the appellants. The appellants were not tried again for the same offence as contemplated under S. 403 (1) but for a distinct offence as contemplated by sub-s. (2). It is true that in order to sustain in the charge under Ss. 332 and 392, I. P. C., the Court had to consider whether the seizure was legal and was made by a public servant in the discharge of his duty but once that was found against the appellants the further question to be determined was as to whether they committed the offence of robbing the Head Constable of the goods lawfully seized and whether they voluntarily caused hurt to him while he was acting in the discharge of his duties as a public servant. *Kunji Lal* v. *State of M. P.*,

A I R 1955 S C 280.

(733) *S. 403—Jail Superintendent having himself punished the detenu under R. 41 of Punjab Communist Rule cannot thereafter refer to Magistrate.*

See Maqbool Hussain v. *The State of Bombay*, A. I. R. 1953 S. C. 325 under Constitution of India, Art. 20 (2).

(734) *S. 404—Power of Supreme Court to look into evidence.*

See Mohinder Singh v. *The State*, A I R 1953 S C 415 under Constitution of India, Arts. 134, 136.

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(735) *Ss. 404 and 411-A — Question of fact —Interference.*

Where the only question raised is the credibility of the witnesses who have been believed, the Supreme Court will not interfere. *Moti Das* v. *The State of Bihar*,

A I R 1954 S C 657 (658).

(736) *S. 411-A — Accused not charged under S. 149, I. P. C. — Supreme Court, if can convict accused under S. 149 — (Penal Code (1860), S. 149).*

Section 149, I. P. C., unlike S. 34, creates a specific offence and deals with the punishment of that offence alone. So where the accused is not charged under S. 149 the appellate Court (Supreme Court hearing appeal on special leave) would require strong reasons. *Pandurang* v. *State of Hyderabad*, **A I R 1955 S C 216.**

(737) *S. 411-A—Practice — (Evidence Act, S. 1).*

The absence of the name of the accused in the first information report and the absence of marks of injury on his person are only material and relevant for the purpose of appreciation of the evidence. Where the Courts below have come to a definite finding on the evidence before them that the accused was a member of the unlawful assembly and took some part in inflicting injuries on the deceased in prosecution of their common object, Supreme Court cannot go behind the concurrent finding. *Thakur Prasad* v. *The State of Madhya Pradash*,

A I R 1954 S C 30 (31).

(738) *Ss. 410, 417 — Vindhya Pradesh Criminal Law Amendment (Special Courts) Ordinance (5 of 1942), S. 5, (2) — Right of appeal from decision of Special Judge.*

Sub-section (2) of S. 5, Vindhya Pradesh Ordinance, is an express provision conferring a right of appeal to the aggrieved party, whether an accused or the State, against the judgment of the Special Judge. The only limitation in S. 5 (2) on the application of the provisions of the Criminal Procedure Code to the proceedings of the Special Court is the one arising from the existence of any inconsistent provisions in the Ordinance and not with reference to the conduct of the proceedings before that very Court. Once the special Court is to be deemed a Court of Session the normal right of appeal provided by S. 410 or S. 417, Criminal P. C. as the case may be, must be taken to have been expressly provided by reference

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and not as arising by mere implication. (1864) 10 H L C 704, *Disting. Shiv Bahadur Singh* v. *State of V. P.*,

A I R 1953 S C 394.

(739) *S. 417 — High Court's power to review evidence — Findings of trial Court —Reversal—Reasons.*

It is well established that in an appeal under S. 417 the High Court has full power to review the evidence upon which the order of acquittal was founded, but it is equally well-settled that the presumption of innocence of the accused is further reinforced by his acquittal by the trial Court, and the findings of the trial Court which had the advantage of seeing the witnesses and hearing their evidence can be reversed only for very substantial and compelling reasons. *Surajpal Singh* v. *The State*,

A I R 1952 S C 52 =1952 S C R 193=1952 S C J 46.

(740) *S. 421 — Summary dismissal —Special leave — (Constitution of India, Art. 136).*

It is not right for the High Court to dismiss an appeal preferred by the accused to that Court summarily where it raises some arguable points which require consideration. In cases which prima facie raise no arguable issue that course is, of course, justified but the Supreme Court would appreciate it if in arguable cases the summary rejection order gives some indication of the views of the High Court on the points raised. Without the opinion of the High Court on such points in special leave petitions under Art. 136 of the Constitution, Supreme Court some times feels embarrassed if it has to deal with those matters without the benefit of that opinion. *Mushtak Hussein* v. *The State of Bombay*, **A I R 1953 S C 282 =1953 S C J 338.**

(741) *S. 421 — Appeal raising substantial and important issues.*

Where both the appeals filed separately by different accused arise out of the same trial and are from one judgment and relate to the same charge to the jury, and what is more they raise substantially the same points, it is anomalous for one Bench of the High Court to dismiss one of them summarily with one word "dismissed" and for another Bench to admit the other appeal by the other accused and write reasoned judgment. Summary rejections of appeals which raise issues of substance and im-

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portance is to be disapproved. *Ramayya* v. *State of Bombay*,

A I R 1955 S C 287.

(742) *Ss. 417, 423—Appeal against acquittal—Estimate of evidence—High Court decision reversed.*

While no doubt on an appeal against acquittal the High Court is entitled to go into the facts and arrive at its own estimate of the evidence, it is also settled law that, where the case turns on oral evidence of witnesses, the estimate of such evidence by the trial Court is not to be lightly set aside. General suspicions are not by themselves enough in an appeal against acquittal to dispute the credibility of witnesses, whom a trial Magistrate was inclined to accept. AIR 1952 S C 52; A I R 1954 S C 637, *Rel. on. S. A. A. Biyabani* v. *The State of Madras*,

A I R 1954 SC 645.

(743) *S. 423—Appeal against acquittal—Duty of High Court.*

In an appeal against acquittal the High Court must not overlook the well-known principles recognised in the administration of criminal justice as laid down by the Privy Council in A I R 1934 P C 227 (2), that the order of acquittal had strengthened the presumption of innocence in favour of the appellant and that he was entitled to the benefit of reasonable doubt must not be lost sight of. *Zwinglee Ariel* v. *State of M. P.*, A I R 1954 S C 15.

(744) *Ss. 417 and 423—Presumption in favour of accused.*

Even in appeal against acquittals, the powers of the High Court are as wide as in appeals from conviction. But there are two points to be borne in mind in this connection. One is that in an appeal from an acquittal, the presumption of innocence of the accused continues right up to the end; the second is that great weight should be attached to the view taken by the Sessions Judge before whom the trial was held and who had the opportunity of seeing and hearing the witnesses. *Wilayat Khan* v. *U. P. State*, A I R 1953 S C 122.

(745) *S. 423 — Jury trial set aside by Supreme Court on ground of misdirection and non-direction to jury — Re-trial not ordered.*

Though it is a normal course to order retrial, when a jury trial is set aside on the ground of misdirection or non-direction, their Lordships did not think it right to

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order a retrial in the circumstances of the case. Their Lordships therefore discharged (not acquitted) the accused leaving it to the Government either to drop the entire matter or to proceed in such manner as it might be advised. *Ramayya* v. *State of Bombay*,

A I R 1955 S C 287.

(746) *S. 423—Appeal from Acquittal.*

The position in regard to interference with order of acquittal by the Trial Court is that the Appellate Court has full powers to review the entire evidence but proper weight and consideration should be given to the following matters : (1) the view of the trial Court as to the credibility of witnesses (2) the presumption of innocence which is strengthened by the acquittal (3) the right of the accused to the benefit of the doubt and (4) the reluctance of the Appeal Court to disturb a finding arrived at by the Trial Judges after seeing the witnesses. *Shiv Bahadur Singh* v. *State of Vindhya Pradesh*, A I R 1953 S C 394.

(747) *S. 423 — Scope — Penal Code (1860), S. 411 — (Evidence Act (1872), S. 114).*

It is settled law that the presumption of the innocence of an accused person is reinforced by an order of acquittal and a heavy onus rests on the prosecution in an appeal from such an order to prove that the order is manifestly erroneous. Thus where in an appeal against acquittal the High Court approached the case as if it was an appeal against conviction and took the view that the accused having given no explanation regarding his knowledge of the place from which the ornaments were taken out, it must be presumed that he must have kept the ornaments there and that the fact that the field did not belong to the accused and that the place was accessible to others would not show that the ornaments were not in his possession but were kept by someone else, held, that it was not the correct way of approaching the decision of a case under S. 411, I. P. C., when the field from which the ornaments were recovered was an open one, and accessible to all and sundry, it is difficult to hold positively that the accused was in possession of these articles. The fact of recovery by the accused is compatible with the circumstances of somebody else having placed the articles there and of the accused somehow acquiring knowledge about their whereabouts and that being so, the fact of

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discovery cannot be regarded as conclusive proof that the accused was in possession of these articles. *Trimbak* v. *The State of Madhya Pradesh*,

A I R 1954 S C 39 (40).

(748) *S. 423—Appeal from acquittal.*

After an order of acquittal the presumption of innocence in favour of the accused is further reinforced and that order can be reversed not on the ground that the accused had failed to explain the circumstances appearing against him but only for very substantial and compelling reasons. *Ajmer Singh* v. *The State of Punjab*,

A I R 1953 S C 76=1953 S C J 85.

(749) *S. 423*—Connected appeals — Retrial—Case of accused A to be heard afresh — Cases of accused A and B closely interconnected — Case of B also should be reheard. *Darshan Singh* v. *State of Punjab*

A I R 1953 S C 83
=1953 S C R 319.

(750) *S. 423 — Appeal against accused.*

Where the earliest information did not mention names of assailants, and though spears were alleged to have been used but there were only mild scratches or very minor incised wounds, neither deep, nor long, nor wide and where there were many other improbabilities in the prosecution evidence Supreme Court set aside the conviction with the following remarks :

In dealing with the injuries found on Sikandar Khan, the learned Judges say "We do not think that the evidence of witnesses is of such a character as to be inconsistent with the medical evidence." The test rather is whether it is inconsistent with the medical evidence, and, if not, whether the accused should not get the benefit. Interference with an order of acquittal made by a Judge who had the advantage of hearing the witnesses and observing their demeanour can only be for compelling reasons and not on a nice balancing of probabilities and improbabilities, and certainly not because different view could be taken of the evidence or the facts. *Wilayat Khan* v. *U. P. State*,

A I R 1953 S C 122.

(751) *S. 423 — Retrial when to be ordered.*

Where there has been no fair and proper trial, the Supreme Court in appeal will in ordinary circumstances remand the case for a fresh trial but where the appellant has been in a state of suspense over his sentence

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of death for more than a year such a course would be unfair and contrary to settled practice and the accused must be set at liberty in such a case. *Mohinder Singh* v. *The State*, A I R 1953 S C 415.

(752) *S. 423—Appeal from acquittal — Appreciation of evidence.*

Though the High Court has full power to review the evidence upon which an order of acquittal is founded, yet the presumption of innocence of the accused being further reinforced by his acquittal by the trial Court, the findings of that Court can be reversed only for very substantial and compelling reasons. In exercising the power conferred by the Code and before reaching its conclusions upon fact, the High Court should, and will, always give proper weight and consideration to such matters as (1) the views of the trial judge as to the credibility of the witnesses : (2) the presumption of innocence in favour of the accused, (3) the right of the accused to the benefit of any doubt; and (4) the slowness of an appellate Court in disturbing a finding of fact arrived at by a judge who had the advantage of seeing the witnesses : A I R 1952 S C 52 and A I R 1934 P C 227 (2), *Ref. Puran* v. *State of Punjab*, A I R 1953 S C 459.

(753) *S. 423—Appeal from acquittal.*

The High Court, even though it is hearing an appeal from an order of acquittal, has full powers to review the entire evidence on the record and reach its own conclusion that the acquittal order should be set aside. In exercising these powers the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Court as to the credibility of witnesses; (2) presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he had been acquitted at the trial; (3) the right of the accused to the benefit of any doubt; and (4) the slowness of an appellate Court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses : A I R 1934 P C 227 (2), *Ref. C. M. Narain* v. *State of Travancore-Cochin*,

A I R 1953 S C 478.

(754) *S. 423 (1) — Appreciation of evidence — Oral evidence of eye-witnesses — Corroboration from circumstantial evidence may be required.*

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In the circumstances of a particular case it would be proper for an appellate Court not to rely upon the oral evidence of eye-witnesses implicating particular accused unless there is some circumstantial evidence to support it. By adopting this standard the appellate Court does not condemn the oral evidence outright, but as a matter of prudence and caution it decides not to convict an accused person unless there were some circumstances to lend support to the evidence of the eye-witnesses with regard to him. The corroboration required is not that kind of corroboration which one requires in the case of an approver or an accomplice, but corroboration by some circumstances which would lend assurance to the evidence before the Court and satisfy it that particular accused persons were really concerned in the offence. *Lakshman Singh* v. *The State*,

A I R 1952 S C 167
=1952 S C R 983
=1952 S C J 230.

(755) *Ss. 423 (2), 297 and 537 (d)—Verdict of jury, setting aside of.*

The statute law in India in certain circumstances permits an appeal against a jury's verdict and authorizes the appellate Court to substitute its own verdict on its own consideration of the evidence.

Unless it is established in a case that there has been a serious misdirection by the Judge in charging the jury which has occasioned a failure of justice and has misled the jury in giving its verdict, the verdict of the jury cannot be set aside.

Where the Supreme Court comes to a conclusion that there was a misdirection the simplest course open to it, is to order a retrial of the accused. It is also open to it to remit the case to the High Court with a direction that it should consider the merits of the case in the light of its decision and say whether there has been a failure of justice as a result of these misdirections. Lastly, it is open to it to examine the merits of the case and decide for itself whether there has been a failure of justice in the case and an innocent man has been convicted.

(Their Lordships took the third course and examined the materials on the record and came to the conclusion that no body of reasonable men could have arrived at the conclusion, that the accused was guilty of

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the offence charged.) *Mushtak Hussein* v. *The State of Bomtay*,

A I R 1953 S C 282
=1953 S C J 338.

(756) *S. 430 — Conviction and Sentence by trial Court—Writ.*

See Janardhan Reddy v. *State of Hyderabad*, A I R 1951 S C 217 under Constitution of India, Art. 32.

(757) *S. 439—Revision against acquittal*

The revisional jurisdiction conferred on the High Court under S. 439, Criminal P.C. is not to be lightly exercised, when it is invoked by a private complainant against an order of acquittal, against which the Government has a right of appeal under S. 417. It could be exercised only in exceptional cases where the interests of public justice require interference for the correction of a manifest illegality, or the prevention of a gross miscarriage of justice. This jurisdiction is not ordinarily invoked or used merely because the lower court has taken a wrong view of the law or misappreciated the evidence on record. *Hari Har* v. *State of West Bengal*,

A I R 1954 S C 266.

(758) *S. 439—Whether sentence can be enhanced to death on revision by Complainant.*

Whether the State filed a revision or the complainant moved the High Court in revision, it is competent to the High Court to go into the question of sentence and it is well within its power to enhance the sentence of transportation for life to one of death. *Bissu Mahgoo* v. *State of Uttar Pradesh*,

A I R 1954 S C 714 (715).

(759) *Ss. 439, 561A—Stay of proceedings.*

As between the civil and the criminal proceedings the criminal matters should be given precedence. No hard and fast rule can be laid down but the possibility of conflicting decisions in the civil and criminal Courts is not a relevant consideration. The law envisages such an eventuality when it expressly refrains from making the decision of one Court binding on the other or even relevant, except for certain limited purposes, such as sentence or damages. The only relevant consideration is the likelihood of embarrassment. Another factor which weighs with the Court is that a civil suit often drags on for years and it is undesirable that a criminal prosecution should wait till

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everybody concerned has forgotten all about the crime. The public interests demand that criminal justice should be swift and sure that the guilty should be punished while the events are still fresh in the public mind and that the innocent should be absolved as early as is consistent with a fair and impartial trial.

Another reason is that it is undesirable to let things slide till memories have grown too dim to trust. This, however, is not a hard and fast rule. Special considerations, obtaining in any particular case might make some other course more expedient and just. For example, the civil case or the other criminal proceeding may be so near its end as to make it inexpedient to stay it in order to give precedence to prosecution ordered under S. 476.

Held that the simultaneous prosecution of the present criminal proceedings and the civil suits will embarrass the accused and that the civil suits should be stayed till the criminal proceedings have finished. *M. S. Sheriff* v. *State of Madras*,

A I R 1954 S C 397 (399)
=1954 S C J 458.

(760) *S. 439 — Revision against acquittal.*

The revisional jurisdiction conferred on the High Court under S. 439, Criminal P. C. is not to be lightly exercised, when it is invoked by a private complainant against an order of acquittal, against which the Government has a right of appeal under S 417. It could be exercised only in exceptional cases where the interest of public justice require interference for the correction of a manifest illegality or the prevention of a gross miscarriage of justice. This jurisdiction is not ordinarily invoked or used merely because the lower Court has taken a wrong view of the law or misappreciated the evidence on record. *Harihar* v. *The State of West Bengal*,

A I R 1954 S C 266 (268).

(761) *Ss. 439, 561A, 526 — High Court quashing charges in inherent powers — Validity — Discharge of some accused and transfer of case to itself—Legality.*

In a trial of 28 persons for conspiracy to commit criminal breach of trust under S. 409, I. P. C. and a falsification of the accounts of a bank under S. 477A. I. P. C. which went on for two years over 6000 exhibits were filed and 203 witnesses were examined for the prosecution. The Magistrate then framed 67 charges against the accused who applied to the High Court to quash them. The High Court finding that it was impracticable to try all the charges which were vague and unintelligible, in one trial, quashed them but directed a retrial of some of the accused on the charge of conspiracy between October 1946 and April 1947 to falsify bank accounts and to bring into existence a false balance-sheet. It also decided to withdraw the case under S. 526 (1) (e), Criminal P. C., to itself and added a direction under S. 526 (2) that the case be tried by warrant procedure but without a jury. A strong recommendation was made to the Government for the appointment of a Director of Prosecutions on a fixed salary not much below that of a High Court Judge for handling this and other complicated cases. In appeal to the Supreme Court by special leave :

Held (1) that though in these peculiar circumstances the High Court was justified in quashing the charges in the exercise of its inherent powers even before the conclusion of the trial, there was no justification in the High Court's judgment for ordering a de novo trial in the situation that had arisen particularly when all these persons had stood a protracted trial for two and a half years.

(2) That when the High Court made a strong recommendation to Government to appoint a Director of Prosecutions for the case on a salary of Rs. 4,000 and also transferred the case to its own records, it ignored altogether the prejudice that such a procedure was sure to cause to the accused persons. The procedure adopted by the High Court tended to divert the due and orderly administration of law into a new course and was likely to serve as an unwholesome precedent.

(3) That the grounds given for absolving some of the accused during the pendency of a prosecution in the exercise of the powers under S. 561A, Criminal P. C. were absolutely untenable.

(4) That it was not necessary to transfer the case to the High Court and to deny the accused persons the right of trial by jury under S. 267, Criminal P C. In doing so the High Court overstepped the limits of its jurisdiction inasmuch as it exercised it in an arbitrary manner without keeping in mind the prejudice it would cause to the accused.

(5) That in these circumstances further trial would not advance the cause of justice

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and hence the order of the High Court directing retrial was quashed. *K. V. Krishnamurthy Iyer* v. *The State of Madras*,

A I R 1954 S C 406 (408).

(762) *S. 439 — Revision — Change of mode of punishment without notice to accused — Validity.*

An accused, a first offender of 18 years, was sentenced to receive 10 stripes under S. 4 (b), Whipping Act, in lieu of the sentence under S. 377, I. P. C. The High Court, in revision, set aside the sentence of whipping as illegal and passed a sentence of 9 months' rigorous imprisonment. No notice was given to the accused before this alteration in sentence. On an objection that this was an enhancement of sentence:

Held that whether it was an enhancement or not, on the whole, the High Court should not have passed the order radically changing the mode of punishment and seriously affecting the accused without giving him an opportunity to show cause against it. *Jangal Prasad* v. *The State*,

A I R 1953 S C 467.

(763) *S. 439 — Revision against acquittal — Powers of interference.*

The revisional jurisdiction conferred on the High Court under S. 439 is not to be lightly exercised, when it is invoked by a private complainant against an order of acquittal, against which the Government has a right of appeal under S. 417. It could be exercised only in exceptional cases where the interests of public justice require interference for the correction of a manifest illegality, or the prevention of a gross miscarriage of justice. This jurisdiction is not ordinarily invoked or used merely because the lower Court has taken a wrong view of the law or misappreciated the evidence on record. An order in revision directing the retrial of a man for a third time for offences which could not be said to have been made out even *prima faice*, cannot be upheld. *D. Stephens* v. *Nosibolla*,

A I R 1951 S C 196
=1951 S C R 284=1951 S C J 269.

(764) *S. 439 (1) — Revision by private party against order of acquittal — Powers of High Court.*

Though sub-s. 1 (b) of S. 430 authorizes the High Court to exercise in its discretion, any of the powers conferred on a Court of appeal by S. 423, sub-s. (4) of S. 439 specifically excludes the power to "convert a finding of acquittal into one of conviction." This does not mean that in dealing with a revision petition by private party against an order of acquittal, the High Court can, in the absence of any error on a point of law reappraise the evidence and reverse the findings of facts on which the acquittal is based provided only it stops short of finding the accused guilty and passing sentence on him.

Thus where in revision by a private party against an acquittal, the High Court Judge reversed the pure findings of fact based on the trial Courts' appreciation of the evidence by merely characterizing the judgment of the trial Court as 'perverse' and lacking in perspective but formally complied with sub-s. (4) of S. 439 by only directing a retrial of the accused without convicting them and warning the Court retrying the case not to be influenced by any expression of opinion in his judgment :

Held that Judge exceeded his powers of revision under the section in dealing with the case in this manner. *Jogendranath Jha* v. *Polai Lal*, A I R 1951 S C 316
=1951 S C R 676=1951 S C J 503.

(765) *S. 476— Opinion on guilt of accused.*

The Court in passing an order under S. 476 should not express any opinion on the guilt or innocence of the accused. *M. S. Sheriff* v. *State of Madras*,

A I R 1954 S C 397 (399)
=1954 S C J 458.

(766) *Ss. 476, 476B — "Expedient in the interests of justice".*

The only relevant consideration is whether "it is expedient in the interests of justice" that an enquiry should be made and a complaint filed. That involves a careful balancing of many factors. Where the lower Court has scrutinised the evidence minutely and disclosed ample material on which a judicial mind could reasonably reach the conclusion that there is a matter which requires investigation in a criminal Court and that it is expedient to the interests of justice to have it enquired into, there is no reason for interfering with the lower Court's discretion. *M. S. Sheriff* v. *State of Madras*,

A I R 1954 S C 397 (399)
=1954 S C J 458.

(767) *Ss. 490 and 488—Order obtained under S. 488 from Court at Lahore before partition — Executability of, in India after partition.*

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Where there is specific legislation after the partition to meet special cases, effect must be given to it but where there is no such legislation then, in the absence of a specific bar, an order which was good and competent when it was made and which was passed by a tribunal which was domestic at the date of its making and which could, at that date have been enforced in an Indian Court, does not lose its efficacy by reason of the partition.

So far as S. 490 is concerned, there is no bar. It is general in terms and imposes no impediment. Hence, an order for payment of maintenance obtained under S. 488 from the Court of a Magistrate at Lahore before partition can be executed under S. 490 in the Court of Magistrate at Delhi.

Kishori Lal v. *Shanti Devi*,

A I R 1953 S C 441.

(768-769) *S. 510—Scope—Contradictory reports of Chemical Examiner and Imperial Serologist — (Evidence Act (1872), S. 45).*

In ordinary circumstances there would be nothing wrong in taking reports of Chemical Examiner and Imperial Serologist on record without exmining these persons as witnesses, as permitted by the Criminal Procedure Code. When, however, there is a difference of opinion in the reports so much so that the effect of the one report is to nullify the effect of the other, the duty to explain the difference is on the prosecution and the mere production of the report does not, under the circumstances, prove anything which can weigh against the accused. *Tulsiram Kanu* v. *The State, Criminal Appeal No. 23 of 1950*

A I R 1954 S C 1 (3) =1953 S C J 612.

(770) *S. 510 — Scope of the section — (Criminal trial—Practice and prccedure).*

It is wholly unnecessary to send all the bottles recovered by the police in the presence of panchas and which contain the same stuff for purpose of analysis.

Perhaps a different inference could also have been drawn from the facts found in the case, *Vijendrajit* v. *State of Bombay*, **A I R 1953 S C 247=1953 S C J 328.**

(771) *S. 514—Bond not taken by Court but by other official — S. 514 does not apply.*

Under S. 514, Criminal P. C., action can be taken only when the bond is taken

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by the Court under the provisions of the Code such as S. 91 for appearance, the several security sections or to those relating to bail.

Where the security bond is taken from the accused not by the Court but by a particular official such as a Procurement Inspector for production of the property before the Court, no action can be taken under S. 514 for forfeiture of the bond. *Rameswar Bhartia* v. *State of Assam*,

A I R 1952 S C 405 =1953 S C R 126=1952 S C J 559.

(772) *S. 517—Bombay District Police Act (10 of 1890), S. 61E — Gold found with accused — Conviction—Order of confiscation of gold under S. 517, Cr. P. C., held inappropriate.*

The power of the Court under S. 517 (1). Cr. P. C., no doubt extends to confiscation of property in the custody of the Court but it is not every case in which the Court must necessarily pass an order of confiscation irrespective of the circumstances of the case.

It is possible to conceive of cases where the subject-matter of the offence may be property which under the law relating to that offence is liable to be confiscated as a punishment on conviction. Section 517 contains a general provision for disposal of the property in the circumstances mentioned in the latter part of the section.

Section 61-E Bombay District Police Act 10 of 1890 by itself does not empower the Court to impose the penalty of confiscation, and the sentence of imprisonment and fine authorised by the section is a nominal sentence for the obvious reason that the section proceeds upon the mere belief that the property in possession of the person is stolen property or property fraudulently obtained possession of which is not satisfactorily accounted for.

Confiscation is not the only mode of disposal under S. 517 and is singularly inappropriate in a case where the accused is prosecuted for an offence punishable with a maximum sentence of 3 months and a fine of Rs. 100 under S. 61E, Bombay District Police Act. In such a case, it is certainly open to the Court to order the property to be delivered to the person claiming to be entitled to its possession.

Where the gold was found from the possession of the accused and the Court was

not called upon to consider any rival claims about its possession and there was no evidence to prove that it was stolen, or that it was fraudulently obtained and all that was found was that there was reason to believe that it was stolen or fraudulently obtained and that the accused failed to account for its possession to the satisfaction of the Court, its confiscation under S. 517 upon the existence of a mere belief required to sustain a conviction under S. 61E would be palpably harsh and unreasonable even assuming that the gold was smuggled from Africa into India. *Suleman Issa* v. *State of Bombay*,

A I R 1954 S C 312.

(773) *S. 517 — Charge of theft—Money found belonging to accused — Acquittal — Money cannot be ordered to be returned to complainant.*

Money found in possession of accused alleged to have been money stolen from complainant—Money found as belonging to accused and not complainant—Accused acquitted—Payment of money to complainant cannot be ordered, unless it is established that offence was committed in respect of this sum. *Pushkar Singh* v. *State of Madhya Bharat*,

A I R 1953 S C 508.

(774) S. 523—*Illegal seizure of goods in possession of petitioner in India under no authority of law at instance of Jammu & Kashmir Police— Where S. 523 applies.*

Where the police in India seized goods in possession of the petitioner in India, at the instance of Police of Jammu and Kashmir, and the seizures were not under any authority of law, inasmuch as they were not under orders of any magistrate nor were they under any of the sections 51, 95, 98 and 165 of the Cr. P. C., since no report of any offence committed by the petitioner was made to the Police in India and the Indian Police were not authorised to make any investigation and the whole affair was a hole-and-corner affair between the officers of the Kashmir Police and the Indian Police.

S. 523 would have no application to the facts of the case and the Magistrate would have no jurisdiction to order the return of the goods. *Wazir Chand* v. *The State of Himachal Pradesh*,

A I R 1954 S C 415, 417
=1954 S C J 600.

(775) *S. 527 (as amended by Act 23 of 1952) — Conviction for attempt to murder Chief Justice of State High Court — Appeal to High Court — Case is fit for transfer to some other High Court.*

For any sound and reputable system of administration of justice it is as important that justice should appear to be done as that it is, in fact, done. Thus where an accused appeals from his conviction for an attempt to murder the Chief Justice of a State High Court and applies for a transfer of his appeal to some other High Court on the ground that he will not have fair and impartial hearing of appeal in the State High Court which is presided over by the complainant, it is a fit case for transfer. (The appeal was transferred to the Bombay High Court from the Mysore High Court). *L. S. Raju* v. *State of Mysore*, **A I R 1953 S C 435.**

(776) *S. 528— Allegations against the trying Magistrate— Whether contempt of Court.*

See Rizwan-ul-Hasan v. State of U. P., A. I. R 1953 S. C. 185 under Contempt of Courts Act (1926).

(777) *S. 533 — Examination of Magistrate — Desirability.*

Where it was objected that the prosecution had not examined as a witness the Magistrate who had recorded the confession under S. 164 :

Held, that it was an improper and undesirable practice to examine Magistrates in such cases. (Observations of the P. C. in *Nazir Ahmed* v. *King-Emperor*, A. I. R. 1936 P. C. 253 (2) (258) *endorsed*).

Editorial Note.— In the observations of the Privy Council in *Nazir Ahmed's case*, the Privy Council held that the practice of examining Magistrates and Judges except in special circumstances such as those provided for by S 533, Cr. P. C., was improper and undesirable. *Kashmira Singh* v. *State of Madhya Pradesh*,

A I R 1952 S C 159
=1952 S C R 526=1952 S C J 201.

(778) *S. 536 — Applicability — Trial held with aid of assessors in pursuance of notification revoking right of trial with aid of assessors—Notification void under S. 269 and Art. 14 — S. 536 has no application—(Constitution of India, Art. 14).*

Section 536 postulates irregularities at the trial after the commencement of the

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proceedings but it does not concern itself with a notification made under S. 269 (i) which travels beyond the limits of that section or which contravenes Art. 14 of the Constitution. The chapter of the Code of Criminal Procedure in which this section is included deals with mere procedural irregularities in the procedure committed by a Court and envisages that when an objection is taken, the Court is then enabled to cure the irregularity.

Where the Government had revoked the right to trial by aid of jury in respect of the trial and the trial was held with the aid of assessors, and the notification of revocation is void under S. 269, Cr. P C. and Art. 14 of the Constitution, the objection to the validity of the trial can be raised in appellate stage, the nature of the objection going to the very root of the jurisdiction of the Court. S. 536 has no application to the case. 23 Mad 632, held not correctly decided. *Dhirendra Kumar* v. *Superintendent and Remembrancer of Legal Affairs*,

A I R 1954 S C 424 (428)
=1954 S C J 582.

(779) *S. 537—Irregularities in investigation—Not affecting merit—Effect.*

Held, that the Supreme Court was unable to enter into the question of the fairness or unfairness of the trial due to certain irregularities in the investigation, for, it did not affect the merits of the matter. The High Court was fully conscious of these defects and although it severely commented upon the conduct of the prosecution, yet, it arrived at the finding adverse to the accused so far as their participation in the offence was concerned. *Gajanand* v. *State of Uttar Pradesh*, A I R 1954 S C 695 (699).

(780) *S. 537—Irregularity in delivering judgment when may be cured.*

As soon as the judgment is delivered, that becomes the operative pronouncement of the Court. The law then provides for the manner in which it is to be authenticated and make certain. The rules regarding this differ but they do not form the essence of the matter and if there is irregularity in carrying them out it is curable. Thus, if a judgment happens not to be signed and is inadvertently acted on and executed, the proceedings consequent on it would be valid because the judgment, if it can be shown to have been validly delivered, would stand good despite defects in the mode of its subsequent authentication. *Surendra Singh* v. *State of Uttar Pradesh*,

A I R 1954 S C 194 (197)
=1954 S C R 330=1954 S C J 12.

(781) *Ss. 540, 537—Witness not examined in committing Court—Examination in Sessions Court as prosecution witness—Admissibility of evidence.*

There is no rule that a witness who was not produced in the committal proceedings cannot be examined in the Sessions Court. The Sessions Court can, under S. 540, Cr. P. C., examine witnesses who were not examined before the Committing Magistrate. If such a witness is treated as a prosecution witness and is examined by the prosecuting counsel instead of by the Court itself, it would be at best an irregularity curable by S. 537, Cr. P. C.

The only question that is to be considered in such a case is whether the accused has been prejudiced by the procedure whether he was taken by surprise and whether prejudice was occasioned by such surprise.

The proper time to object to such procedure is at the trial itself. The explanation to S. 537 requires a Court to take into consideration the facts whether any objection on the score of irregularity could have been raised at an earlier stage :

Held on facts that there was no prejudice caused to the accused. *Bhagwan Singh* v. *State of Punjab (1)*, AIR 1952 S C 214 =1952 S C R 812=1952 S C J 284.

(782) *S. 556 — "Personally interested"—Meaning of—Magistrate granting sanction for prosecution in another capacity is not disqualified from trying case himself—Trial is not illegal—Distinction between sanction and direction pointed out.*

Where a Magistrate, who had granted a sanction for prosecution of the accused under S. 38 of the Assam Food Grains Control Order in his capacity as a Director under that Order, tries the case himself, the trial is not rendered illegal, as it cannot be said that by reason of granting such sanction he had become 'personally interested' in the case within the meaning of S. 556, Criminal P. C.

The question whether a Magistrate personally interested or not has essentially to be decided on the facts in each case. Pecuniary interest, however small, will be a disqualification, but as regards other kinds of interest, there is no measure or standard

except that it should be a substantial one, giving rise to a real bias, or a reasonable apprehension on the part of the accused of such bias. The maxim "*Nome debt esse judex in propria sua causa*" applies only when the interest attributed is such as to render the case his own cause.

"Personal interest" within the meaning of S. 556, Criminal P. C., is not limited to private interest, and it may well include official interest also.

The explanation to the section shows that to be connected with a case in a public capacity is not by itself enough to render the person incompetent to try it. Even if he had made an enquiry in connection with the case, it would not matter.

It is evident from the words of the illustration to the section that if a prosecution is directed by a person in one capacity, he shall not try the case acting in another capacity as a Magistrate.

The explanation and illustration lend some support to the view that there is a distinction between a passive interest and an active interest, and it is only in the latter case that the disqualification arises or intervenes.

A sanction for prosecution does not stand on the same footing as a direction for prosecution. In both cases of sanction and direction, an application of the mind is necessary, but there is this essential difference that in the one case there is a legal impediment to the prosecution if there be no sanction, and in the other case, there is a positive order that the prosecution should be launched. For a sanction, all that is necessary for one to be satisfied about is the existence of a *prima facie* case. In the case of a direction a further element that the accused deserves to be prosecuted is involved. The fulfilment of a technical requirement imposed by a statute may not, in many cases, amount to a mental satisfaction of the truth of the facts placed before the officer. Whether sanction should be granted or not may conceivably depend upon considerations extraneous to the merits of the case. But where a prosecution is directed, it means that the authority who gives the direction is satisfied in his own mind that the case must be initiated. Sanction is in the nature of a permission, while a direction is in the nature of a command : A I R 1948 P C 82, *Discussed* ; 8 Beng L R 422 ; 24 Mad 238

and 5 Bom L R 542, *Ref. Rameshwar Bhartia* v. *State of Assam*,

A I R 1952 S C 405 =1953 S C R 126=1952 S C J 559.

CRIMINAL TRIAL

(783) *Criminal trial—Evidence — Previous statements alleged to be made under police threats and duress—Court not bound to make enquiry.*

It is no part of a Court's duty to enter upon a roving enquiry in the middle of a trial on matters which are collateral to the main issue such as whether a statement is made under threats and duress of the police. The burden is on the person making the allegations to substantiate them and if he chooses to rely on evidence which does not satisfy the Court he must suffer the same fate as every other person who is unable to discharge an onus which the law places upon him. *Bhagwan Singh* v. *State of Punjab (1)*,

A I R 1952 S C 214 = 1952 S C R 812 = 1952 S C J 284.

(784) *Criminal trial — Imposition of fine—Nature of sentence to be imposed.*

See Adamji Umer Dalal v. State of Bombay, A. I. R. 1952 S C. 14 under Essential Supplies (Temporary Powers) Act Ss. 7 and 8.

(785) *Criminal trial — Misjoinder of charges.*

See Janardhan Reddy v. State of Hyderabad, A. I. R 1951 S. C. 217 under Constitution of India, Art. 32.

(786) *Criminal trial — Practice.*

In the absence of legal proof of the crime, there can be no legal criminality. *The State Government Madhya Pradesh* v. *Ramkrishana Ganpatrao Limsey*

A I R 1954 S C 20 (23).

CUSTOM

(787) *Custom (Punjab) — Principles to be kept in view in dealing with questions of customary law stated.*

The general principles which should be kept in view in dealing with questions of customary law may be summarized as follows:

(1) It should be recognised that many of the agricultural tribes in the Punjab are governed by a variety of customs, which depart from the ordinary rules of Hindu and Muhammadan law, in regard to inheritance

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and other matters mentioned in S. 5 of the Punjab Laws Act (1872).

(2) In spite of the above fact, there is no presumption that a particular person or class of persons is governed by custom, and a party who is alleged to be governed by customary law must prove that he is so governed and must also prove the existence of the custom set up by him. 110 Pun Re 1906 p. 390 at p. 410; A I R 1917 P C 181 *Ref.*

(3) A custom, in order to be binding must derive its force from the fact that by long usage it has obtained the force of law; but the English rule that "a custom in order that it may be legal and binding, must have been used long that the memory of man runneth not to the contrary" should not be strictly applied to Indian conditions. All that is necessary to prove is that the usage has been acted upon in practice for such a long period and with such invariability as to show that it has, by common consent, been submitted to as the established governing rule of a particular locality. A I R 1941 P C 21, *Ref.*

(4) A custom may be proved by general evidence as to its existence by members of the tribe or family who would naturally be cognizant of its existence, and its exercise without controversy, and such evidence may be safely acted on when it is supported by a public record of custom such as the Riwaj-i-am or Manual of Customary Law. A I R 1925 P C 267, *Ref.*

(5) No statutory presumption attaches to the contents of a Riwaj-i-am or similar compilation, but being a public record prepared by a public officer in the discharge of his duties under Government rules, the statements to be found therein in support of custom are admissible to prove facts recited therein and will generally be regarded as a strong piece of evidence of the custom. The entries in the Riwaj-i-am may however be proved to be incorrect, and the question of evidence required for the purpose of rebutting them will vary with the circumstances of each case. The presumption of correctness attaching to a Riwaj-i-am may be rebutted, if it is shown that it affects adversely the rights of females or any other class of persons who had no opportunity of appearing before the revenue authorities. A I R 1916 P C 129; A I R 1944 P C 18: A I R 1941 P C 21 *Ref.*

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(6) When the question of custom applicable to an agriculturist is raised, it is open to a party who denies the application of custom to show that the person who claims to be governed by it has completely and permanently drifted away from agriculture and agricultural associations and settled for good in urban life and adopted trade, service etc., as his principal occupation and means and source of livelihood, and does not follow other customs applicable to agriculturists. 55 Pun Re 1908, p. 270 at p. 274; A I R 1927 Lah. 642, *Ref.*

(7) Tha opinions expressed by the Compiler of a Riwaj-i-am or Settlement Officer as a result of his intimate knowledge and investigation of the subject, are entitled to weight which will vary with the circumstances of each case. The only safe rule to be laid down with regard to the weight to be attached to the Compiler's remarks is that if they represent his personal opinion or bias and detract from the record of long-standing custom, they will not be sufficient to displace the custom, but if they are the result of his inquiry and investigation as to the scope of the applicability of the custom and any special sense in which the exponents of the custom expressed themselves in regard to it, remarks should be given due weight. A I R 1935 Lah 419; A I R 1935 Lah 985; A I R 1941 Lah 73 *Ref. Gokul Chand* v. *Parvin Kumari*,

A I R 1952 S C 231
= 1952 S C J 331.

(788) *Custom — Adoption — Rule as to ceremonies and preferences in selection — Nature of — (Hindu Law—Adoption).*

Whether a particular rule recorded in the Riwaj-i-am is mandatory or directory must depend on what is the essential characteristic of the custom. Under the Hindu law adoption is primarily a religious act intended to confer spiritual benefit on the adopter and some of the rules have, therefore, been held to be mandatory and compliance with them regarded as a condition of the validity of the adoption. On the other hand, under the Customary Law in the Punjab, adoption is secular in character, the object being to appoint an heir and the rules relating to ceremonies and to preferences in selection have to be held to be directory and

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adoptions made in disregard of them are not invalid. *Hem Singh* v. *Harnam Singh*, A I R 1954 S C 581 (584) =1954 S C J 566.

(789) *Custom (Pepsu) — Alienation by father—Property is ancestral—Burden of proof—(Evidence Act (1872), Ss. 101-103).*

Where the plaintiff's case is that the property in suit (situated in Pepsu) was his father's ancestral property and it was alienated without legal necessity then under the customary law which, and not the Hindu Law applies, the plaintiff can only succeed if he can prove that the property was ancestral.

The burden of proof is on the plaintiff and to establish the ancestral character of land it is not sufficient to show that the name of the common ancestor from whom the parties are descended was mentioned in the revenue pedigree. It should also be proved that the descendants of that common ancestor held the land in ancestral shares and that the land occupied, at the time of the dispute by the proprietors thereof had devolved upon them by inheritance. *Kura* v. *Jag Ram*,

A I R 1954 S C 269 (269, 271).

(790) *Custom (Punjab)—Riwaj-i-am—Evidentiary value — Riwaj-i-am of Gurdaspur district—Validity—(Evidence Act (1872), S. 35).*

It is well settled that though the Riwaj-i-ams are entitled to an initial presumption in favour of their correctness irrespective of the question whether or not the custom, as recorded is in accord with the general custom, the quantum of evidence necessary to rebut that presumption will, however, vary with the facts and circumstances of each case.

Where, for instance, the Riwaj-i-am lays down a custom in consonance with the general agricultural custom of the province, very strong proof would be required to displace that presumption; but where, on the other hand, the custom as recorded in the Riwaj-i-am is opposed to the custom generally prevalent, the presumption will be considerably weakened.

Likewise, where the Riwaj-i-am affects adversely the rights of the females who had no opportunity whatever of appearing before the Revenue authorities, the presumption will be weaker still and only a few instances would be sufficient to rebut it. A I R 1932 Lah 157; A I R 1935 Lah 617 and A I R 1944 Lah 72. *Ref.*

If the Riwaj-i-am produced is a reliable and a trustworthy document, has been carefully prepared and does not contain within its four corners contradictory statements of custom and in the opinion of the Settlement Officer is not a record of the wishes of the persons appearing before him as to what the custom should be, it would be a presumptive piece of evidence in proof of the special custom set up.

Held on examination of the documents, that the Riwaj-i-ams of the Gurdaspur district in so far as they purport to record the local custom as to the right of succession of daughters to the self-acquired properties of their respective father are not reliable and trustworthy documents. *Salig Ram* v *Maya Devi*, A I R 1955 S C 266.

(791) *Custom (Punjab) — Succession—Saraswat Brahmins of Gurdaspur district —Self-acquired property — Daughter excludes collaterals — Onus of proof—(Evidence Act (1872), Ss. 101, 48).*

The customary rights of succession of daughters as against the collaterals of the father with reference to ancestral and non-ancestral lands are stated in para. 23 of Rattigan's Digest of Customary Law. It is categorically stated in sub-para. (2) of that paragraph that the daughter succeeds to the self-acquired property of the father in preference to the collaterals even though they are within the fourth degree. Rattigan's work has been accepted as "a book of unquestioned authority in the Punjab." A I R 1954 S C 579, *Ref.*

The general custom of the Punjab being that a daughter excludes the collaterals from succession to the self-acquired property of her father the initial onus, therefore, must on principle, be on the collaterals to show that the general custom in favour of the daughter's succession to the self-acquired property of her father has been varied by a special local custom excluding the daughter which is binding on the parties. AIR 1941 P C 21, *Ref*,

Held on facts that the collateral had failed to discharge the onus that was initially on him and that being the position, no burden was cast on the daughter which she need have discharged by adducing evidence

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of particular instances. *Case law referred. Salig Ram* v *Maya Devi*,

A I R 1955 S C 266.

(792) *Custom (Punjab) — Succession— Agricultural Jats—Non-ancestral property —Gift by daughter to her sons—Claim by collaterals.*

Under the Punjab custom among the Agricultural Jats, the daughter is preferred to the collaterals in respect of the acquired property of her father. If she has sons, the estate descends to them and to their male issues who exclude the collaterals.

Thus, where after the death of *A*, an agricultural Jat in the Punjab, his self-acquired property was inherited by his daughter *B* who in her life time, gifted all the property to her sons and the collaterals sued for declaration that *B* being only a limited heir, the gift would not affect their reversionary rights.

Held that the gift operated to accelerate the succession. That being the case, the plaintiffs were no longer the reversioners even if they would otherwise have been entitled to succeed on failure of the daughter's sons and their line. *Gopal Singh* v. *Ujagar Singh*,

A I R 1954 S C 579 (580-581)
=1954 S C J 562.

CY PRES

(793) *'Cy pres'—Doctrine of—Application to charitable trust — Hindu Law— (Religious Endowment).*

When the particular purpose for which a charitable trust is created fails or by reason of certain circumstances the trust cannot be carried into effect either in whole or in part, or where there is a surplus left after exhausting the purposes specified by the settlor, the Court will not, when there is a general charitable intention expressed by the settlor, allow the trust to fail but will execute it 'cy pres', that is to say, in some way as nearly as possible to that which the author of the trust intended. -In such cases, it cannot be disputed that the court can frame a scheme and give suitable directions regarding the objects upon which the trust money can be spent. It is well established, however, that where the donor's intention can be given effect to, the Court has no authority to sanction any deviation from the intentions expressed by the settlor on the grounds of expediency and the Court cannot exercise the power of applying trust

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property or its income or other purposes simply because it considers them to be more expedient or more beneficial than what the settlor had directed. *Ratilal Panachand Gandhi* v. *State of Bombay*,

A I R 1954 S C 388 (394)
=1954 S C J 480

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(794) *Deed—Construction — (T. P. Act (1882), S. 8).*

Where a document has to be construed, the intention must be gathered, in the first place, from the document itself. If the words are express and clear, effect must be given to them and any extraneous enquiry into what was thought or intended is ruled out. The real question in such a case is not what the parties intended or meant but what is the legal effect of the words, which they used. If, however, here is ambiguity in the language employed, then it is permissible to look to the surrounding circumstances to determine what was intended. *Chunchun Jha* v. *Ebadat Ali*,

A I R 1954 S C 345
=1954 S C J 469.

(795) *Deed—Construction—Release deed.*

Held: It is well settled that the general words of a release deed do not mean release of rights other than those then put up and have to be limited to the circumstances which were in the contemplation of the parties when it was executed. *Chhinnathayi Kalasekara* v. *Pandia Naicker*,

A I R 152 S C 29=1952 S C R 291
=1952 S C J 1.

(796) *Deed—Construction—Intention—Surrounding circumstances — T. P. Act (1882), S. 8.*

In construing a document, whether in English or in vernacular, the fundamental rule is to ascertain the intention from the words used; the surrounding circumstances are to be considered but that is only for the purpose of finding out the intended meaning of the words which have actually been employed: A I R 1930 P C 242, *Rel. on. Ram Gopal* v. *Nand Lal*,

A I R 1951 S C 139
=1950 S C J 575
=1950 SCR 766.

(797) *Deed—Construction — Proviso— T. P. Act (1882), S. 8.*

Per *Mukherjea J.*—A proviso is normally an excepting or a qualifying clause and the effect of it is to except out of the preceding

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clause upon which it is engrafted something which but for the proviso would be within it.

Per *Chandrasekhara Aiyar J.* — The technical rules of interpretation of provisos and exceptions, with reference to their scope and legal effect, adopted in constructing statutes should not ordinarily be imported in interpreting deeds and documents executed by layman. In ordinary deeds, a proviso may sometimes be in the nature of an explanation of the main clause or provision; and the Court must look not merely at the form of the language but its substance the governing idea of the purpose of the deed, the context and the surrounding circumstances to gather the real meaning or intention of the executant. *Angurbala* v. *Debabrata*,

A I R 1951 S C 293
=1951 S C J 394
=1951 S C R 1125.

(798) *Deed— Construction — Indenture dedicating properties to deity—Provisions as to succession to shebaitship : Reversing A I R 1949 Cal 278 and appellate judgment of Calcutta High Court, D/- 19-5-1950 which confirmed it.*

A Hindu widow *N* and her only son *M* who was the real owner of the properties in question, executed an indenture by which certain properties were dedicated to deity. After declaring various trusts, the indenture provided for appointment of shebaits and for devolution of shebaitship. *N* was to become the first shebait, after her death, *M* was to become the shebait, after *M* his wife *K* and after *K's* death, the heirs of *M* were to act as shebaits. Then there was a proviso to the effect that if the said *M* should happen to die without any issue or without giving any authority to his wife, him surviving, to adopt, then, in such case, it should be competent for *M* to appoint by will or otherwise a Shebait who would act as such after the death of the said wife; but in case the said *M* should happen to die without any issue, the shebaitship of the said Thakur after the death of his wife should devolve upon his heirs under Hindu Law. *K* died during the lifetime of *M*, leaving a son *D* defendant in the suit. Soon after, *M* married the plaintiff as his second wife and soon died after the marriage. The plaintiff filed a suit for declaration that she was the sole shebait of the deity under the

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terms of the indenture or in the alternative was entitled to shebaitship jointly with *D*, she being a coheir of her step-son under the Hindu Women's Rights to Property Act:

Held (Per *Fazl Ali, Mahajan and Mukerjea JJ.*)—(i) that *K* particularly and not the wife of *M* had been given rights of succession to shebaitship prior to any issue of *M*.

(ii) that there was no indication in the indenture of any intention to treat the heirs of *M* as the objects of an independent gift. The words "heirs of *M*" could only be construed as words of inheritance and the devolution of shebaitship had been directed to be in the line of heirs of the founder: A I R 1945 F C 25, *Rel. on.*

(iii) that the word "heirs" in the main provision had been used in its ordinary and natural sense and could not be limited to issue only. It extended to all persons who were entitled to succeed under the law.

(iv) that as *M* left a son, the contingency contemplated by the proviso did not arise at all and the proviso was to be ignored altogether for purposes of construction :

(v) that the plaintiff was entitled to joint shebaitship with the defendant in respect of debutter properties : Reversing A I R (36) 1949 Cal 278 and appellate judgment of Calcutta High Court, D/- 19-5-1950.

(Per *Chandrasekhara Aiyar J.*) — The proviso explained what he meant by his heirs in the preceding clause. In that view *D* would succeed to the office in preference to the plaintiff (But His Lordship admitted that the construction placed on the indenture by the other Judges noted above, was also a possible one and he did not desire to express any dissent from the result they had reached). *Angurbala* v. *Debabrata*,

A I R 1951 S C 293
=1951 S C J 394
=1951 S C R 1125.

(799) *Deed— Construction—Interpretation of document with reference to interpretation of another document.*

Per *Mahajan J.* — Unless the language of two documents is identical, an interpretation, placed on one document is no authority for the proposition that a document differently drafted, though using partially similar language, should be similarly interpreted. *Abdullah Ahmed* v. *Animendra Kissen*,

AIR 1950 S C 15
=1950 S C J 153=1950 S C R 30.

Defence of India Rules (1939)

(800) *Deed — Construction — Extrinsic evidence to determine effect of instrument —Evidence Act (1872), S. 92.*

Per *Mahajan J.*—Extrinsic evidence to determine the effect of an instrument is permissible where there remains a doubt as to its true meaning. Evidence of the acts done under it is a guide to the intention of the parties in such a case and particularly when acts are done shortly after the date of the instrument. *Abdulla Ahmed* v. *Animendra Kissen*, AIR 1950 S C 15 =1950 S C J 153=1950 S C R 30.

DEFENCE OF INDIA RULES (1939)

(801) *R. 81 (2) (bb)—Powers conferred under—Applicability.*

The words "for regulating the letting and sub-letting" etc.; in sub-cl. (bb) mean that the Government might provide for and regulate the letting and sub letting etc. It cannot, therefore, be urged that the power conferred under this sub-clause applied only to those cases where the house was available for letting or sub-letting and not to cases where a house was not so available. *D. K. Nabhirahiah* v. *State of Mysore*, AIR 1952 S C 339=1952 S C R 744 =1952 SCJ 490.

(802) *R. 81 (2) (bb) — Regulation of letting and sub-letting—Exercise of police power — Question of compensation and public purpose — (Constitution of India, Art. 31 (2).)*

The regulation of letting and sub-letting houses is rather the exercise of a police power of regulation in public interests than anything done in the exercise of a power of eminent domain, in which case alone questions relating to compensation and public purpose will arise. *D. K. Nabhirahiah* v. *State of Masore*, AIR 1952 S C 339 =1952 S C R 744=1952 S C J 490.

(803) *R. 81 (4) — Supply of petrol without coupons—Mens rea—Liability of employer for acts of employees.*

Clauses 22 & 25 of the Motor Spirit Rationing Order, 1941 read with Defence of India Rules, 1939, do not rule out the necessity of mens rea. Therefore where employees of the licensee of a petrol filling station supply petrol to a car-owner without taking coupons and thus act in contravention of provisions of the said clauses, the licensee who was not present when the wrongful act was done and had no knowlege of it, could not be convicted for contravention of the said clauses under R. 81 (4) of the Defence of India Rules. *Ravula Hariprasada Rao* v. *The State*, AIR 1951 S C 204 =1951 S C R 322.

DELHI LAWS ACT (1912)

(804) *S. 7—Ajmer-Merwara (Extension of Laws) Act (1947), S. 2—Part C States (Laws) Act (1950), S. 2—Power to apply existing Legislation to specified areas conferred on subordinate authority — Power including power to restrict, amend and repeal—Validity—Principles of delegated legislation exhaustively discussed.*

Per *Fazl Ali, Shastri, Mukherjea, Das and Bose, JJ., Kania C. J. and Mahajan, J. Contra.* — S. 7 of the Delhi Laws Act, 1912 was valid and no part thereof was 'ultra vires' the legislature that passed it.

The Ajmer-Merwara (Extension of Laws) Act, 1947, was valid and no part thereof was ultra vires the Legislature that passed it.

Per *Fazl Ali, Sastri and Das, JJ.*— S. 2 of the Part C States (Laws) Act, 1950, is valid and no part thereof is 'ultra vires' the Parliament.

Per *Mukherjea and Bose, JJ.* — S. 2 of the Part C States (Laws) Act, 1950, is intra vires except for the concluding sentence which runs as follows: "any provision may be made in any enactment so extended for the repeal or amendment of any corresponding law (other than a Central Act) which is for the time being applicable to that part C State." This portion is *ultra vires* but as it can be separated from the rest of the Act, the remainder is good.

Per *Bose J.*:—"My answers are, however, subject to this qualification. The power to "restrict" and "modify" does not import the power to make essential changes. It is confined to alterations of a minor character such as are necessary to make an Act intended for one area applicable to another and to bring it into harmony with laws already in being in the State, or to delete portions which are meant solely for another area."

Per *Kania C. J. and Mahajan J.*:—S. 7, Delhi Laws Act, 1912, S. 2, Ajmer-Merwara (Extension of Laws) Act, 1947, and S. 2, Part C States (Laws) Act, 1950, are *ultra vires* the Legislature, functioning at the relevant dates, to the extent power is given to the Government (Executive) to extend Acts other than Acts of the Central Legislature.

Delhi Laws Act (1912)

By enacting S. 7, Delhi Laws Act, the legislature virtually abdicated its legislative power in favour of the executive. That was not warranted by the Indian Councils Act, 1861 or by any decision of the Privy Council or on the basis of any legislative practice. The section, therefore, is ultra vires the Indian Councils Act, 1861, in the following particulars: (i) inasmuch as it permits the executive to apply to Delhi Laws enacted by legislatures not competent to make laws for Delhi and which these legislatures may make within their own legislative field, and, (ii) inasmuch as it clothes the executive with co-extensive legislative authority in the matter of modification of laws made by legislative bodies in India.

Section 2, Ajmer-Merwara (Extension of Laws) Act, 1947 and S. 2, Part C States (Laws) Act, 1950, are also *ultra vires* the Government of India Act, 1935, and the Constitution of India respectively, in the two particulars stated above.

Fazl Ali J.:—The power of introducing necessary restrictions and modifications in the provisions in question is incidental to the power to apply or adapt the law. The modifications are to be made within the framework of the Act and they cannot be such as to affect its identity or structure of the essential purpose to be served by it. The power to modify certainly involves a discretion to make suitable changes, but it would be useless to give an authority the power to adapt a law without giving it the power to make suitable changes.

The discretion given to modify a statute is by no means absolute or irrevocable in strict legal sense.

Mukherjea J.:—The word "restriction" connotes limitation imposed upon a particular provision so as to restrain its application or limit its scope. It does not by any means involve any change in the principle. In the context, and used along with the word "restriction" the word "modification" has been employed also in the cognate sense and it does not involve any material or substantial alteration. The word "modification" in S. 7 of the Delhi Laws Act means and signifies changes of such character as are necessary to make the statute which is sought to be extended suitable to the local conditions of the province. The executive government is not entitled to change the whole nature or policy underlying any particular Act or take different portions from different statutes and prepare an *amalgam* of several laws.

(Question whether legislative powers may be delegated at all and if yes, to what extent it may be done, exhaustively discussed by all the Judges). *In re Art. 143, Constitution of India and Delhi Laws Act (1912) etc.* A I R 1951 S C 332
1951 S C J 527=1951 S C R 747.

East Punjab Refugees (Registration of Land Claims) Act (1948)

(804-A) **EAST PUNJAB COTTON CLOTH AND YARN (REGULATION OF MOVEMENT) ORDER, 1947.**

See Darshan Singh v. State of Punjab, A I R 1953 S C 83 under Essential Supplies (Temporary Powers) Act (1946).

(804-B) **EAST PUNJAB SAFETY ACT.**

See under Public Safety.

EAST PUNJAB REFUGEES (REGISTRATION OF LAND CLAIMS) ACT (12 OF 1948).

(805) *Ss. 4, 7, 11 — Offence committed under Ordinance (7 of 1948)—Prosecution under the Act — Validity—(East Punjab Refugees (Registration of Land Claims) Ordinance (7 of 1948), Ss. 4, 7)—(General Clauses Act (1897), S. 6).*

Whenever there is a repeal of an enactment, the consequences laid down in S. 6 of the General Clauses Act will follow unless, as the section itself says, a different intention appears. In the case of a simple repeal there is scarcely any room for expression of a contrary opinion. But when the repeal is followed by fresh legislation on the same subject the Court would undoubtedly have to look to the provisions of the new Act, but only for the purpose of determining whether they indicate a different intention. The line of enquiry would be, not whether the new Act expressly keeps alive old rights and liabilities, but whether it manifests an intention to destroy them. The Court cannot therefore subscribe to the broad proposition that S. 6 of the General Clauses Act is ruled out when there is repeal of an enactment followed by a fresh legislation. Section 6 would be applicable in such cases also unless the new legislation manifests an intention incompatible with or contrary to the provisions of the section. Such incompatibility would have to be ascertained from a consideration of all the relevent provisions of the new law and the mere absence of a saving clause is by itself not material. The provi-

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sions of S. 6 of the General Clauses Act will apply to a case of repeal even if there is simultaneous enactment unless a contrary intention can be gathered from the new enactment. Of course, the consequences laid down in S. 6 of the Act will apply only when a statute or regulation having the force of a statute is actually repealed. It has no application when a statute, which is of a temporary nature automatically expires by efflux of time.

The Ordinance 7 of 1948 was undoubtedly a temporary statute but the period during which it was to continue had not expired when the Repealing Act 12 of 1948 was passed. The repeal therefore was an effective one which would normally attract the operation of S. 6 of the General Clauses Act. The offence committed by the accused consisted in filing a false claim. The claim was filed in accordance with the provision of S. 4 of the Ordinance and under S. 7 of the Ordinance, any false information in regard to a claim was punishable offence. Section 11 of the Act did not make the claim filed under the Ordinance a claim under the Act so as to attract the operation of S. 7. The expression 'anything done occurring in S. 11' did not mean or include an act done by a person in contravention of the provisions of the Ordinance. What the section contemplated and kept alive were rules, notifications or other official acts done in exercise of the powers conferred by or under the Ordinance and these powers were mentioned in several sections of the Act.

But although the lodging of the claim did not come within the purview of S. 11 of the Act, the proviso to S. 4 of the Act clearly showed that a claim filed under the Ordinance would be treated as one filed under the Act with all the consequences attached thereto. Such claim would be reckoned and registered as a claim under the Act and once it was so treated the incidents and corollaries attached to the filing of a claim, as laid down in the Act, must necessarily follow. The truth or falsity of the claim had to be investigated in the usual way and if it was found that the information given by the claimant was false, he could certainly be punished in the manner laid down in Ss. 7 and 8 of the Act. The provisions of Ss. 4, 7 and 8 made it apparent that it was not the intention of the legislature that the rights and liabilities in respect of claims filed under

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the Ordinance shall be extinguished on the passing of the Act, and this was sufficient for holding that the present case would attract the operation of S. 6 of the General Clauses Act. The Act did not evince an intention which was inconsistent with the continuance of rights and liabilities accrued or incurred under the Ordinance. *State of Punjab* v. *Mohar Singh* A I R 1955 S C 84.

(805-A) **EAST PUNJAB URBAN RENT RESTRICTION ACT, 1949.**

See Waryam Singh v. Amar Nath, A I R 1954 S C 45 under Constitution of India.

ELECTION

(806) *Election disputes—Duty to comply with procedural requirements of election law — Effect of non-compliance — (Representation of the People Act (1951), S. 80 and Part VI)—(Civil P. C. (1908), S. 9).*

The general rule is well settled that the statutory requirements of election law must be strictly observed and that an election contest is not an action at law or a suit in equity but is a purely statutory proceeding unknown to the common law and that the court possesses no common law power. It is also well settled that it is a sound principle of natural justice that the success of a candidate who has won at an election should not be lightly interfered with and any petition seeking such interference must strictly conform to the requirements of the law. None of these propositions, however, has any application if the special law itself confers authority on a Tribunal to proceed with a petition in accordance with certain procedure and when it does not state the consequences of non-compliance with certain procedural requirements laid down by it. It is always to be borne in mind that though the election of a successful candidate is not to be lightly interfered with one of the essentials of that law is also to safeguard the purity of the election process and also to see that people do not get elected by flagrant breaches of that law or by corrupt practices. In cases where the election law does not prescribe the consequence or does not lay down penalty for non-compliance with certain procedural requirements of that law, the jurisdiction of the Tribunal entrusted with the trial of the case is not affected. *Jagan Nath* v. *Jaswant Singh*,

A I R 1954 S C 210
=1954 S C R 842
=1954 S C J 257.

ESSENTIAL SUPPLIES (TEMPORARY POWERS) ACT (1946)

(807) *S. 1 (3)—Extension of Act from 1-4-1950 up till 31-3-1951 by resolution of Constituent Assembly (Legislative), D/-20-12 1949 — Validity—(India (Central Government and Legislature) Act (1946) (as adopted by India Provisional Constitution) Order (1947), Ss. 4 and 4A) — Constitution of India, Arts. 379 (1), 372 (1) and 394).*

As the Constituent Assembly was to continue in existence till "the commencement of the Constitution," which by Art. 394, is 26th January 1950, the power conferred on it as a designated body by the English statute the India (Central Government and Legislature) Act (1946) as adapted by the India (Provisional Constitution) Order (1947), could be validly exercised on 20th December 1949 and was so exercised when it passed the resolution of that date. The provisional Parliament under Art. 379 (1) was not a body authorised to exercise the special power of approving the extension of the period mentioned in S. 4 of the English statute nor can bringing the provisional Parliament into existence on 26th November 1949 (assuming that to be the case) be regarded as "other provision" made by the Constituent Assembly within the meaning of S. 4A of the English Act.

The resolution of 20th December 1949 took immediate effect and its effect was to alter the date fixed for the expiration of the period mentioned in S. 4 of the English statute from 31st March 1950 to 31st March 1951. The Essential Supplies (Temporary Powers) Act (1946) was, therefore, by virtue of its S. 1 (3), and act which was alive immediately before 26th January 1950 and which was due, at that time, to expire of its own force, not on 31st March 1950 but 31st March 1951, and as this was a law in force, because of Art. 372 (1) and expln. III, until it was due to expire. *Sisir Kumar Dutta* v. *State of W. B.*,

A I R 1953 S C 63
=1953 S C R 644
=1953 S C J 56.

(808) *S. 1 (3)—Applicability to Darjeeling district — Act was validly in force till 31-3-1950 in that district — Government of India Act (1935), S. 92 (1) — India (Central Government and Legislature) Act (1946), (9 and 10 Geo. VI, Ch. 39), Ss. 4, 4A — Indian Independence Act (1947), Ss. 9 and 19 (4).*

The Essential Supplies (Temporary Powers) Act which came into force on 19-11-1946 was validly extended to the district of Darjeeling, an excluded area, by virtue of a notification of the Governor of Bengal issued on 14-12-1946 under S. 92 (1), Government of India Act, 1935, and was validly in force in that district till 31-3-1950. The Governor's notification did not specify any particular period for its applicability to that district and therefore the Act would remain in force in the district so long as it remained in force in the rest of India. The life of the Essential Supplies Act would have expired on 31-3-1947 under S. 1 (3) of the Act read with S. 4 of the India (Central Government and Legislature) Act, 1946 but by virtue of a notification issued by the Governor-General on 3-3-1947 its life was extended to 31-3-1948. A fresh notification under S. 92 (1), Government of India Act was not necessary to continue the life of the Act in the district of Darjeeling. Under S. 9 read with S. 19 (4), Independence Act, 1947, the Governor-General passed an order on 14-8-1947, which substituted the words "Dominion Legislature" for "both Houses of Parliament" in the proviso to S. 4 of the India (Central Government and Legislature) Act, 1946 and also introduced a new S. 4A by way of adaptation, providing that the powers of the Dominion Legislature shall be exercised by the Constituent Assembly. On 25-2-1948, the Constituent Assembly passed its first resolution extending the operation of the Essential Supplies Act by one year upto 31-3-1949. On 23-3-1949, a second resolution was passed by the Assembly extending the life of the Act by one more year upto 31-3-1950. As soon as the adaptations came into force by order of the Governor-General, the Constituent Assembly acquired the powers conferred on both Houses of Parliament under S. 4 of the India (Central Government and Legislature) Act. The validity of the adaptations is beyond question.

The fixation of the period of operation of the Essential Supplies Act is not left to any other enactment. It is provided by S. 1 (3) of the Act itself. The Legislature has itself applied its mind and has fixed the duration of the Act, but has left the machinery to reach the maximum period by instalments

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to be worked out in a particular manner. There is here no question of delegation at all, much less delegation of any legislative power: A I R (36) 1949 F C 175, *Disting. Joylal* v. *The State*,

A I R 1951 S C 484 =1951 S C J 743 =1952 S C R 127.

(809) *Ss. 2 (a) and 17 (2) — Turmeric is foodstuff — Spices (Forward Contracts Prohibition) Order (1944), Cl. (3) — Essential Supplies (Temporary Powers Ordinance (1946), S. 5).*

Turmeric is a "foodstuff" within the meaning of clause 3 of the Spices (Forward Contracts Prohibition) Order, 1944, read with section 2 (a) of the Essential Supplies (Temporary Powers) Act, 1946.

As turmeric was specifically included with certain other spices, it is clear that turmeric was considered under R. 81 (2) of the Defence of India Rule to be a commodity essential to the life of the community. Turmeric can fall within the wider meaning of the term "foodstuffs". Had the Central Government re-promulgated the Spices (Forward Contracts Prohibition) Order of 1944 in 1946 after the passing of either the Ordinance or the Act of 1946. the Order would have been good. The Order of 1944 falls within the purview of S. 5 of the Ordinance of 1946 and as it is saved by that, it is equally saved by section 17 (2) of the Act of 1946: Case law discussed. *State of Bombay* v. *Virkumar*,

A I R 1952 S C 335 = 1952 S C R 877 = 1952 S C J 496.

(810) *S. 3—Scope of—Power to regulate or prohibit by issuing directions to particular producer.*

The term "notified order" in S. 3 (1) which is defined as meaning "an order notified in the official Gazette" is wide enough to cover special as well as general orders relating to the matters specified in S. 3. The power to provide for regulating or prohibiting production, distribution & supply conferred on an executive body may well include the power to regulate or prohibit by issuing directions to a particular producer or dealer or by requiring any specific act to be done or forborne in regard to production etc. That sub-section thus authorises the making of *ad hoc* or special orders with

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respect to any particular person or thing *Santosh Kumar* v. *The State*,

A I R 1951 S C 201 = 1951 S C J 291 = 1951 S C R 303.

(811) *S. 3 (1) & (2)—Scope of—Seizure of an article.*

Sub-section (2) of S. 3 confers no further or other powers on the Central Govt. than what are conferred under sub-s (1) for it is "an order made thereunder" that may provide for one or the other of the matters specifically enumerated in sub-s. (2) which are only illustrative, as such enumeration is without prejudice to the generality of the powers conferred by sub-s. (1)". Seizure of an article being thus shown to fall within the purview of sub-s. (1), it is competent for the Central Govt. or its delegate, the Provincial Govt. to make an order for seizure under that sub section apart from & irrespective of the anticipated contravention of any other order as contemplated in cl. (j) of sub-s. (2). *Santosh Kumar* v. *The State*,

A I R 1951 S C 201 = 1951 S C J 291=1951 S C R 303.

(812) *Ss. 3, 4—"Scope"—East Punjab Cotton Cloth and Yarn (Regulation of Movement) Order (1947), Ss. 2, 3, 10.*

The provisions of Ss. 2, 3 and 10 of the East Punjab Cotton Cloth and Yarn (Regulation of Movement) Order which prohibit 'inter alia' the export of certain essential commodities to any country outside India without a permit and make the violation of such provisions an offence were validly made by the Governor in exercise of the powers delegated to him under S. 4, Essential Supplies (Temporary Powers) Act, 1946. *Darshan Singh* v. *State of Punjab*,

A I R 1953 S C 83 = 1953 S C R 319.

(813) *S. 3 — Validity of — Delegation of legislative powers — What is — (Constitution of India, Art. 245).*

The Legislature cannot delegate its function of laying down legislative policy in respect of a measure and its formulation as a rule of conduct. The Legislature must declare the policy of the law and the legal principles which are to control any given cases and must provide a standard to guide the officials or the body in power to execute the law. The essential legislative function consists in the determination or choice of the legislative policy and of formally enacting

that policy into binding rule of conduct. A. I. R 1951 S. C. 332, Rel. on.

The preamble and the body of the sections in the Essential Supplies (Temporary Powers) Act sufficiently formulate the legislative policy and the ambit and character of the Act is such that the details of that policy can only be worked out by delegating them to a subordinate authority within the framework of that policy. S. 3 of the Act, therefore, does not amount to delegation of legislative power outside the permissible limits. Case law referred. *Harishankar Bagla* v. *M. P. State*, **A I R 1954 S C 465 = 1954 S C J 637.**

(814) *S. 4 — Validity of — Delegation of delegated power — (Constitution of India, Art. 245).*

S. 4 enumerates the classes of persons to whom the power could be delegated or sub-delegated by the Central Government and it is not correct to say that the instrumentalities have not been selected by the Legislature itself. The section, therefore, cannot be attacked on the ground that it empowers the delegate to further delegate its powers in respect of the exercise of its powers under S. 3. (1934) 293 U. S. 388 and (1934) 295 U. S. 495, distinguished; 1938 A. C. 708, Rel. on. *Harishankar Bagla* v. *M P. State*, **A I R 1954 S C 465 = 1954 S C J 637.**

(815) *S. 6 — Validity — Does not repeal any Act — (Constitution of India, Art. 245).*

Section 6 does not either expressly or by implication repeal any of the provisions of pre-existing laws; neither does it abrogate them. Those laws remain untouched and unaffected so far as the statute book is concerned. Its object is simply to by-pass them where they are inconsistent with the provisions of the Essential Supplies (Temporary Powers) Act, (1946), or the orders made thereunder. By passing a certain law does not necessarily amount to repeal or abrogation of that law. That law remains unrepealed but during the continuance of the Order made under S. 3, it does not operate in that field for the time being. The ambit of its operation is thus limited without there being any repeal of any one of its provisions.

Even assuming that to the extent of a repugnancy between an order made under S. 3 and the provisions of an existing law, the existing law stands repealed by implication, the repeal is not by any act of the delegate, but the repeal is by the legislative act of the Parliament itself. By enacting S. 6, Parliament itself has declared that an Order made under S. 3 shall have effect notwithstanding any inconsistency in the Order with any enactment other than this Act. This is not a declaration made by the delegate but by the legislature which has declared its will that way in S. 6. Parliament being supreme it certainly could make a law abrogating or repealing by implication provisions of any pre-existing law and no exception could be taken on the ground of excessive delegation to the act of the Parliament itself. There is thus no delegation involved in the provisions of S. 6 at all and that section could not be held to be unconstitutional on that ground. *Harishankar Bagla* v. *M. P. State*, **A I R 1954 S C 465 = 1954 S C J 637.**

(816) *Ss. 7, 8 — Penal Code (1860), S. 53—Measure of punishment — Principles as to — Offence of blackmarketing — Fine imposed held excessive and reduced.*

The determination of the right measure of punishment is often a point of great difficulty and no hard and fast rule can be laid down, it being a matter of discretion which is to be guided by a variety of considerations, but the Court has always to bear in mind the necessity of proportion between an offence and the penalty. In imposing a fine it is necessary to have as much regard to the pecuniary circumstances of the accused persons as to the character and magnitude of the offence, and where a substantial term of imprisonment is inflicted, an excessive fine should not accompany it except in exceptional cases.

It is no doubt true that the offence of black-marketing is very generally prevalent in this country at the present moment and when it is brought home against a person, no leniency in the matter of sentence should be shown and a certain amount of severity may be very appropriate and even called for. However, when quite a substantial sentence of imprisonment is awarded to the accused, a person belonging to the commission agency class, imposition of unduly heavy fines which may have been justified to some extent in the case of the principals, is not called for.

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Held, that as in imposing the heavy fines for offences under Ss. 7 and 8, Essential Supplies (Temporary Powers) Act, 1946, due regard had not been paid to these considerations and the zeal to crush the evil of black-marketing and free the common man from the plague had perturbed the judicial mind in the determination of the measure of punishment, the amount of fines was reduced. *Adamji Umar Dalal* v. *State of Bombay*, A I R 1952 S C 14 =1952 S C R 172=1951 S C J 820.

(817) *Ss. 7 and 9 — Contravention of Notification, dated 2-2-1946*: *Cr. A. No. 394 of 1950, D/. 5-3-1951 (Bom.)*, REVERSED.

Government of India Notification, dated 2-2-1946—Printed form—Instruction III—'Physical delivery'—Control over the goods has always been regarded as one of the tests of physical or '*de facto*' possession: A I R 1938 Nag 254 and A I R 1952 Mad 718 (F B), *Approved. Seksaria Cotton Mills, Ltd.* v. *The State of Bombay*, A I R 1953 S C 278 =1953 S C R 825=1953 S C J 355.

(818) *Ss. 7 and 9 — Contravention of Notification, dated 2-2-1946.*

Government of India Notification, dated 2-2-1946 — Printed form Column 3 — 'Others' — The entry in Column 3 is not intended to be confined to quota-holders or their agents but means what it says namely, the person to whom physical delivery of the goods has been made whoever he may be. *Seksaria Cotton Mills Ltd.* v. *The State of Bombay*, A I R 1953 S C 278 =1953 S C R 825=1953 S C J 355.

(819) *Ss. 7, 15 — Burden of proof — (Evidence Act (1872), Ss. 101 to 103)— (Constitution of India, Art. 136)—(C. P. and Berar Food Grains Export Restriction Order (1943), Cl. 2 (1) (a)). A I R 1951 Nag 226*, REVERSED.

Under S. 15, Essential Supplies (Temporary Powers) Act, 1946, where any person is prosecuted for contravening any order made under S. 3 which prohibits him from doing an act without a permit the burden of proving that he has such a permit shall be on him. The accused produced the permit authorising him to export 'chuni bharda' and showed that the commodity which he was exporting fell within the description of 'chuni bharda'. The burden then lay upon the prosecution to prove that the commodity which was being exported was not 'chuni bharda' but was uncleaned tur dal. It was not for the accused to prove that the commodity which he was exporting was not uncleaned tur dal. Even if the commodity contains 80 to 90 per cent. of dal it might still be 'bharda'. As the words 'chuni' or 'bharda' or 'chuni bharda' had been used by the prosecution witnesses as interchangeable and it would be impossible in this state of the evidence to come to the conclusion that even though the commodity could fall within the description of 'chuni bharda' for the export of which the accused had the necessary permit the commodity which was being actually exported was not 'chuni bharda' but uncleaned tur dal. The accused was certainly under the circumstances entitled to the benefit of the doubt. Substantial and grave injustice had been done to the accused and there was sufficient cause for interference by the Supreme Court. A I R 1950 S C 169, *Foll. Shrinivas Panna Lal* v. *State of M. P.*, A I R 1954 S C 23.

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(820) *S. 1 —Appreciation of evidence— Cr. P. Code (1898), S. 411-A.*

Though the absence of an injury on the person of the appellant may indicate that he did not actually take a leading part in dealing blows to members of the opposite faction but it does not necessarily indicate against his being present at the fracas and directing the operations as deposed to by the eye witnesses. Again the absence of the name of the appellant in the first information report and the absence of marks of injury on his person are only relevant for the purpose of the appreciation of the evidence, and where the Courts below have come to a definite finding on the evidence before them that the appellant was a member of the unlawful assembly and took some part in inflicting injuries on others in prosecution of their common object, the Supreme Court cannot go behind the concurrent finding. *Thakur Parsad* v. *State of M. P.*, A I R 1954 S C 30.

(821) *S. 1— Evidence— Criminal trial —Appreciation.*

Where the facts which the prosecution themselves do not controvert in the witness-box are found to accord with the accused's

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story, the Court should not overlook it, by drawing presumptions against it. But it is far worse when the sessions Judge leads the accused to believe that their version on this point is true and then turns round in the judgment and puts the evidence just the other way round. *Hate Singh* v. *State of M. B.*, A I R 1953 S C 468.

(822) *S. 1— Evidence—Appreciation—Criminal trial.*

Only one gun which was admitted by accused to have been used, found buried — Other gun found lying in the open — This tends to suggest that only the incriminating weapon was hidden. *Hate Singh* v. *State of M. B.*, A I R 1953 S C 468.

(822A) *S. 1—Criminal Procedure Code, S. 367— Appreciation of evidence.*

See Dalip Singh v. State of Punjab, A. I. R. 1953 S. C. 364, under Criminal Procedure Code, S. 367.

(823) *Ss. 3 and 88 — Proof of telegraphic message.*

Telegraphic message — No presumption can be made as to the person by whom such message was sent — No evidence to show that it was sent by the person by whom it was purported to be sent — On the other hand he specifically denying it — Message held to be not proved. *Kishore Chandra* v. *Ganesh Prasad*, A I R 1954 S C 316.

(824) *S. 3 —Circumstantial evidence— Nature of, required for conviction —Held on facts that the circumstances were not such as to lead to the inference that the accused were guilty of some of offences charged against them but as regards other offences there were circumstances sufficient to found conviction —Non-examination of accused on circumstances appearing against them —No prejudice—No retrial— Criminal P. C. (1898), Ss. 342 and 367.*

Roof of a godown belonging to the accused was requisitioned by the Government for the use of the military. During the occupation by the military, the accused had repeatedly complained to the authoriries that the roof was being damaged by the military authorities by the way in which it was being used, that as a consequence of it the roof had begun to leak and that the jute belonging to the accused which was stored underneath the roof, in the godown was being spoiled. After the premises were de-requisitioned and handed over to the accused, the accused laid

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claim to compensation and damages. The claim was scrutinized by the Government Officer and the claim for the reduced amount was sanctioned and paid to the accused. The gravamen of the prosecution case was that the allegations of damage to the roof by misuse of the military as well as the allegation of collapse thereof were absolutely false, fraudulent and collusive and that there had been deliberate misrepresentation in this behalf while it was the defence case that these allegations were substantially true and that there was no question of any misrepresentation, fraud or collusion. In the view of the High Court, the evidence did not disclose that any damage to the roof worth the name was caused by the occupying military and the subsequent conduct of the accused was such as to lead to a reasonable and necessary inference that the claim in this respect was fraudulent and the result of a conspiracy. There was no specific evidence, in the nature of contemporaneous reports or the like as to the condition of the roof (1) when it was taken over by the military authorities from the accused and (2) when it was handed back by them to the accused nor was there any direct evidence about the actual kind of use to which it was being put by the Government during this period:

Held, (i) that in the absence of direct evidence the conclusions had to be necessarily formed with reference to the assertions and counter-assertions in the correspondence between the accused and the Government and the subsequent conduct of the parties. The offences charged had therefore, to be brought home to the accused in the light of the principles laid down by A I R 1952 S C 343 as applicable to such cases. Before a person could be found guilty with reference to mere circumstantial evidence, each of the circumstances relied upon must be clearly established and the proved circumstances taken together must be such as reasonably to exclude the probability of innocence.

(ii) that taking all the features together, the circumstances actually made out fell far short of establishing any dishonesty or fraud in respect of claim for compensation due in respect of damage to the roof. There might be room for suspicion that the claim was rather over-rated and that one of the accused who recommended the claim and on whose recommendation it was sanctioned was accom-

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modating. But this was no substitute for proof of dishonesty and fraud.

(iii) that as regards the claim for compensation in respect of the alleged damages to the stock of jute stored within the godown, there was reason to think, on the evidence in the case (apart from any subsequent circumstances) that the claim had been very much inflated without any basis or foundation, though the occurrence of some damage might be true and that the question then was whether the circumstances brought forward relating to this portion of the case were such as to lead to a clear inference that this claim was fraudulent and the result of a conspiracy.

(iv) that there were definite and clinching circumstances against the accused which led to a reasonable and necessary conclusion that the claim put farward by them for compensation in respect of the alleged damage to the jute had been deliberately and fraudulently bolstered up, and was the result of a mutual arrangement.

(v) that the fact that the accused were not questioned on these matters and the fact that there was no reference to these circumstances appearing against them in their examination under S. 342, Criminal P. C. was a serious irregularity which could not be lightly ignored; if prejudice was thereby caused, such an irregularity would entail retrial in the circumstances of a case like this. But before a retrial could be ordered the Court must be clearly satisfied about prejudice having been caused.

(vi) that no serious prejudice was caused to the accused by this irregularity and that a retrial at the stage of Supreme Court Appeal was not likely to be productive of any fruitful purpose. *Kedar Nath* v. *State of West Bengal*,

A I R 1954 S C 660.

(825) *Ss. 3 and 18—Possession of Article—Nature of.*

Where as many as 108 bottles and two drums of rectified spirit and various other articles were found in a godown admittedly in possession of, and all that was suggested was that these had been planted there by the police but it was not said that as the godown was accessible to several other persons they might have kept the spirit there, the suggestion that the police placed the articles in the godown cannot bear examination in view of the evidence and in these circumstances the Magistrate was justified in drawing the inference that these articles were in possession of the appellant, particularly when the defence of the accused that the articles were found outside the godown was negatived. Supreme Court would not be justified in disturbing the decision of the Courts below on special leave merely on the ground that perhaps a different inference could also be drawn from the facts found in the case. *Vijendrajit* v. *State of Bombay*, **A I R 1953 S C 247.**

(826) *S. 3—Circumstantial Evidence — Mere suspicion, howsoever strong not enough for conviction—Penal Code (1860), S. 201.*

Where it appeared on fact that the body of the deceased was found in a trunk, which was discovered from a well and that the appellant took part in the disposal of the body : *Held*, that these facts do not establish the cause of his death or the manner and circumstances in which it came about. In the absence of any direct evidence to prove that potassium cyanide was administered to the deceased by any person, it could not be said that he died as a result of administration of potassium cyanide ;

Held further, that in view of the situation of the parties and belated investigation of the case and the sensation it created, it was absolutely necessary for the Courts below to safeguard themselves against the danger of basing their conclusions on suspicions howsoever strong. *Palvinder Kaur* v. *State of Punjab*, **A I R 1952 S C 354 =1952 S C J 545=1953 S C R 94.**

(827) *Ss. 8, 14 and 53—Eviaence of character—Conduct—State of mind.*

In criminal proceedings a man's character is often a matter of importance in explaining his conduct and in judging his innocence or criminality. Many acts of an accused person would be suspicious or free from all suspicion when the character of the person by whom they are done is known. Even on the question of punishment an accused is allowed to prove general good character.

Thus, where the allegation against the accused was that he was acting in pursuance of the policy of the Ittehad-ul-Muslimeen, that his state of mind was to exterminate the Hindus, held that the accused was entitled to lead evidence to show that he did not possess that State of mind. *Habeeb Mohammad* v. *State of Hyderabad*, **A I R 1954 S C 51 =1954 S C R 475.**

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(828) *S. 8—Statement showing conduct.*

Accused while going out after taking the alleged bribe being halted, making statement—Statement held not admissible under S. 8. *Zwinglee Ariel* v. *State of M. P.*,

A I R 1954 S C 15.

(829) *S. 9 — Test identification parade —Purpose of.*

Test identification parades are held by the police in the course of their investigation for the purpose of enabling witnesses to identify the properties which are the subject-matter of the offence or to identify the persons who are concerned in the offence. They are not held merely for the purpose of identifying property or persons irrespective of their connection with the offence. Whether the police officers interrogate the identifying witnesses or the panch witnesses who are procured by the police do so, the identifying witnesses are explained the purpose of holding these parades and are asked to identify the properties which are the subject-matter of the offence or the persons who are concerned in the offence. *Ramkrishan* v. *Bombay State*,

A I R 1955 S C 104.

(830) *S. 13—Judgment, admissibility as transaction.*

In a suit where succession to the office of K the late mahant is in dispute, a judgment in a suit by K challenging a certain alienation of property as mahant, is admissible as a transaction in which K from whom one of the parties to the present suit purports to derive his title, asserted his right as a spiritual collateral of M and on that footing got a decree. *Sital Das* v. *Sant Ram*,

A I R 1954 S C 606.

(831) *S. 13—Custom—Proof—(Custom (General)—Proof).*

Oral evidence as to instances which can be proved by documentary evidence cannot safely be relied upon to establish custom, when no satisfactory explanation for withholding the best kind of evidence is given. *Saraswathi Ammal* v. *Jagadambal*,

A I R 1953 S C 201 =1953 S C R 939=1953 SC J 287.

(832) *S. 13—Judgment.*

Previous suit for maintenance by widow of joint Hindu family—Maintenance asked to be charged on joint family property — Amount of maintenance to depend on extent of joint family property — Issue as to extent of property actually framed — Judgment in suit held admissible as an instance in which there was assertion that certain properties belonged to joint family, in subsequent suit for partition in which those properties are claimed to be self-acquired properties. *Srinivas* v. *Narain*,

A I R 1954 S C 379 =1954 S C J 408.

(833) *S. 13—Custom—Proof—(Custom (General)—Proof).*

It is incumbent on a party setting up a custom to allege and prove the custom on which he relies and it is not any theory of custom or deductions from other customs which can be made a rule of decision but only any custom applicable to the parties concerned that can be the rule of decision in a particular case. Custom cannot be extended by analogy and it cannot be established by *a priori* method. *Saraswathi Ammal* v. *Jagadambal*,

A I R 1953 S C 201 =1953 S C R 939=1953 S C J 287.

(834) *S. 18—Admission by party.*

What is admitted by a party to be true must be presumed to be true unless the contrary is shown. *Nathu Lal* v. *Durga Parsad*,

A I R 1954 S C 355=1954 S C 557.

(835) *Ss. 18, 24—Admission or confession to be taken as a whole.*

An admission made by a person whether amounting to a confession or not cannot be split up and part of it used against him. An admission must be used either as a whole or not at all. *Hanumant* v. *State of M. P.*

A I R 1952 S C 343 =1952 S C R 1091=1952 S C J 509.

(836) S. 19—Recitals in a document by person alleged to be agent of accused—Before the recitals can be used against accused, in a criminal case agency must be satisfactorily proved. *Kedar Nath* v. *State of West Bengal*,

A I R 1954 S C 660.

(837) Ss. 25, 26—Statement by accused on being halted to Police Officer—It is not admissible as confession being hit by S. 25 —Such statement is not admissible under S. 26, being made in immediate presence of magistrate, where it was not recorded in manner laid down by S. 164, Cr. P. C. — (Criminal P. C. (1898), S. 164). *Zwinglee Ariel* v. *State of M. P.*

A I R 1954 S C 15.

(838) *S. 24 — Retracted confession — (Criminal P. C. (1898), S. 164).*

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No hard and fast rule can be laid down regarding the necessity of corroboration in the case of a retracted confession in order to base a conviction thereon. But apart from the general rule of prudence where the circumstances of a particular case cast a suspicion on the genuineness of the confession it would be sufficient to require corroboration of the retracted confession.

A confession should not be accepted merely because it contains a wealth of detail which could not have been invented. Unless the main features of the story are shown to be true it is unsafe to regard mere wealth of uncorroborated detail as a safeguard of truth. *Mathu Swami* v. *State of Madras*,

A I R 1954 S C 4.

(839) *S. 24 — Retracted confession — Conviction on—Legality—Criminal P. C. (1898), S. 164.*

Accused A and B were charged and convicted of offences under Ss. 457, 380 and 461, Penal Code and their conviction was confirmed on appeal. The High Court in revision upheld B's conviction but acquitted. A recording its findings which destroyed the prosecution case almost in its entirety. The conclusion of B's guilt rested solely on his retracted confession, not only uncorroborated in material particulars but devoid of truth in many substantial particulars. In using the confession for this purpose the High Court did not advert to substantial truth of the story as narrated by accused but rested their view on a line of reasoning which was entirely at variance with the confession and in fact outside its scope.

Held that the conviction based solely on the retracted confession was opposed to law and could not be allowed to stand. *Arjun Lal* v. *The State*,

A I R 1953 S C 411.

(840) *S. 24 — Retracted confession — Corroboration—(Criminal P. C. (1898), S. 164).*

It is a settled rule of evidence that unless a retracted confession is corroborated in material particulars, it is not prudent to base a conviction in a criminal case on its strength alone.

(Held that the evidence in the case was not worthy of belief and could not be used for corroboration). *Puran* v. *State of Punjab*,

A I R 1953 S C 459.

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(841) *S. 24—Confession — Exculpatory statements.*

A confession must either admit in terms the offence, or at any rate, substantially all the facts which constitute the offence. An admission of a gravely incriminating fact, even a conclusively incriminating fact is not of itself a confession. A statement that contains self-exculpatory matter cannot amount to a confession, if the exculpatory statement is of some fact, which if true, would negative the offence alleged to be confessed. A statement which when read as a whole is of an exculpatory character and in which the prisoner denies his guilt is not a confession and cannot be used in evidence to prove his guilt *Palvinder Kaur* v. *State of Punjab*,

A I R 1952 S C 354 =1953 S C R 94=1952 S C J 545.

(842) *S. 24—Confessions—Mode of use.*

Confession and admission must either be accepted as a whole or rejected as a whole and the Court is not competent to accept only the inculpatory part while rejecting the exculpatory part as inherently incredible. *Palvinder Kaur* v. *State of Punjab*,

A I R 1952 S C 354 =1953 S C R 94=1952 S C J 545.

(842A) *S. 24 — Confession — Proof of voluntariness — Onus of proof — Corroboration by evidence prior to confession.*

See Hem Raj v. *The State of Ajmer*, A. I. R. 1954 S. C. 462 under Criminal Procedure Code, S. 164.

(843) *S. 27 — Scope and Applicability.*

Section 27, Evidence Act is an exception to the rules enacted in Ss. 25 and 26 of the act which provide that no confession made to a police officer shall be proved as against a person accused of an offence and that no confession made by any person whilst he is in the custody of a police officer unless it be made in the immediate presence of a Magistrate, shall be proved as against such person. Where, however, any fact is discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, that part of the information as relates distinctly to the fact thereby discovered can be proved whether it amounts to a confession or not. The expression "whether it amounts to a confession or not" has been used in order to emphasise the position that even though it may amount to a confession that much information as relates distinctly to the fact thereby discovered can be proved

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against the accused. The section seems to be based on the view that if a fact is actually discovered in consequence of information given some guarantee is afforded thereby that the information was true and accordingly can be safely allowed to be given in evidence. But clearly the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate. A I R 1947 P C 67, *Referred to.*

Under S. 27, Evidence Act what is allowed to be proved is the information or such part thereof as relates distinctly to the fact thereby discovered. The information would consist of a statement made by the accused to the police officer and the police officer is obviously precluded from proving the information or part thereof unless it comes within the four corners of the section. If the police officer wants to prove the information or a part thereof, the Court would have to consider whether it relates distinctly to the fact thereby discovered and allow the proof thereof only if that condition was satisfied. If however the police officer does not want to prove that information or any part thereof, S. 27, does not come into operation at all.

The evidence of the Investigating Officer, was that on a certain day the accused 1 made a certain statement in consequence of which he took accused 1 and 2 to Itawa and leaving the accused 2 there the party proceeded to Bhagwasi with the accused 1 and that the accused 1 there pointed out Baliram who at the instance of accused 1 dug out from a mud house a tin box containing three revolvers and two tins containing live cartridges:

Held that the statement of the Investigating Officer was admissible in evidence against accused 1 without attracting the operation of S. 27, Evidence Act. A I R 1932 Cal 297, *Approved.* Cri. Appeals Nos. 454 and 464 of 1949 with Cr. Revn. Appln. No. 952 of 1949 (Bom), *Doubted.*

Per *Jagannadhadas J.*—It may be that when a police officer speaks to a recovery being "on the information of" or "at the instance of" an accused, S. 27 of the Evidence Act is not in terms attracted. But when a police officer speaks to a recovery of this kind as having been "at the instance of an accused" or "in consequence of information given by an accused" he is being

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allowed to place on record not merely the fact of his having received some information but also the implication thereof, viz., that the information is of a character which directly connects the accused with the objects recovered. The prosecution cannot be permitted to rely on such evidence without placing the admissible portion of the information on the record. The information given by an accused in such a situation may be such which, if scrutinised, shows only his remote connection and not direct connection. In such a situation evidence of the bare fact of information having been given may be inadmissible and such evidence may cause serious prejudice. *Ramkrishna* v. *Bombay State* A I R 1955 S C 104.

(844) *S. 27—Information given by several accused—Initial pointing out by one of accused—Admissibility of discoveries.*

Where on being interrogated by the police, the accused persons made certain statements which were duly recorded by the police and in these statements it was disclosed that the dead bodies of the persons murdered were thrown in a *nala* and thereafter the police party with the accused went to the *nala* where each of them pointed out a place where different parts of the dead bodies were discovered but the "initial pointing out" was by the accused *S*:

Held that even if the rule to be applied in the case was that it is only the information which is first given that is admissible under S. 27 and once a fact has been discovered in consequence of information received from a person accused of an offence, it cannot be said to be rediscovered in consequence of information received from another accused person, the case was covered by the rule and the discoveries made at the instance of *S* were admissible in evidence under S. 27. *Lakshman Singh* v. *The State.* A I R 1952 S C 167 =1952 S C R 839 =1952 S C J 230.

(845) *S. 30, S. 114, illus (b) and S. 133—Confession—Evidentiary value—Use of, in corroboration of accomplices and approvers—Criminal P. C. (1898), S. 164.*

The confession of an accused person is not evidence in the ordinary sense of the term as defined in S. 3. It cannot be made the foundation of a conviction and can only be used in support of other evidence. The proper way is, first, to marshall the evidence against the accused excluding the confession

altogether from consideration and see whether, if it is believed a conviction could safely be based on it. If it is capable of belief independently of the confession, then of course it is not necessary to call the confession in aid. But cases may arise where the Judge is not prepared to act on the other evidence as it stands even though, if believed, it would be sufficient to sustain a conviction. In such an event the Judge may call in aid the confession and use it to lend assurance to the other evidence and thus fortify himself in believing what without the aid of the confession he would not be prepared to accept.

As regards its use in the corroboration of accomplices and approvers, a co-accused who confesses is naturally an accomplice and the danger of using the testimony of one accomplice to corroborate another has repeatedly been pointed out. The danger is in no way lessened when the "evidence" is not on oath and cannot be tested by cross examination. Prudence will dictate the same rule of caution in the case of a witness who though not an accomplice is regarded by the Judge as having no greater probative value. But all these are only rules of prudence. So far as the law is concerned, a conviction can be based on the uncorroborated testimony of an accomplice provided the Judge has the rule of caution, which experience dictates, in mind and gives reasons why he thinks it would be safe in a given case to disregard it;

It follows that the testimony of an accomplice can in law be used to corroborate another though it ought not to be so used save in exceptional circumstances and for reasons disclosed. The tendency to include the innocent with the guilty is peculiarly prevalent in India and it is very difficult for the Court to guard against the danger. The only real safeguard against the risk of condemning the innocent with the guilty lies in insisting on independent evidence which in some measure implicates such accused. *Kashmira Singh* v. *State of Madhya Pradesh.*

A I R 1952 S C 159
=1952 S C R 526
=1952 S C J 201.

(846) *Ss. 32 and 33—In discharge of professional duty—Panjis (Pedigree tables) maintained by Panjikars.*

Panjis are maintained by Panjikars who are professional genealogists and they systematically maintain pedigree tables in the

community of Naithal Brahmins. They go from place to place and periodically ascertain the genealogies of their clients and enter them in Panjis (palm leaf manuscripts of genealogy) and add to them such fresh additions as occur in the family from time to time. They are considered important in this community because questions of marriage (who may marry whom) and relationship and caste turn on them. It is the business of these Panjikars to collect this information about pedigrees and presumably they endeavour to collect correct information because what they put down about one man will affect a whole family and the families of those who marry into it. Also, there are checks and counter checks as information pours in from different members and branches of the family. They would consequently fall into disrepute if their books contained glaring inaccuracies. Statements about pedigree are not therefore lightly made.

Plaintiffs in a suit claimed as reversioners of the propositus and put in evidence, Exs. 4, 4(a), 4(b), 4(d) and 4(e), the panjis written by their family panjikars. The witness who proved Exs. 4 and 4(a) deposed that the latter was written by his father and the former by a brother of his grandfather and that they were taken from the collection of Panjis which were in the handwriting of his father, grandfather, great grandfather and great grand-uncle. He also stated that he saw Ex. 4(a) long before the question in dispute arose. As regards Ex. 4 it was evident that it had been written long before Ex. 4(a) was written by the witness's father. The witness who proved Ex. 4(b) stated that it was written by his grand-father who died long ago and that he saw that before the dispute arose. As regards Exs. 4(d) and 4(e), the evidence of a witness who had been examined in a previous case stated that the former was written partly by his father, and partly by an ancestor whose writing he was unable to identify because they were written before he was born. As regards the earliest entries in Ex. 4(e) it stated that the witness was not clear but presumed they had been written by his father. His father was dead long before the dispute in the suit in question arose:

Held (i) Exhibit 4 (a) was admissible under S. 32(2) and also under S. 32 (6): A I R 1922 Bom 51 and A I R 1931 P C 45, *Rel. on.*

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(ii) Exhibit 4 was admissible under S. 32 (6) but even if it was written after the dispute arose it would also be admissible under S. 32 (2) because that sub-section did not impose the limitation that the entry should have been made before the dispute arose.

(iii) that the entries in Ex. 4(b) were made before the dispute arose (Section 32(6)) and were in any case admissible under S. 32 (2).

(iv) that panjis, Ex. 4(d) and 4(e) were ancient and had come from proper custody and also were admissible under S. 32(2) and S. 32 (6).

(v) that the evidence of the witness who proved Exs. 4(d) and 4(e) was admissible under S, 33. *Sita Ji* v. *Brijendra Narain Choudhry.* **A I R 1954 S C 601.**

(847) *S. 32—Entries in the almanac—Probative value.*

Held that the weight which could be attached to documents which on the face of them are regularly kept cannot attach to entries in an almanac maintained in loose sheets, with blanks left at different places, as the sheets and entries could be substituted or interpolated at different places, if one were so minded. Having regard to these defects therefore it is not possible to say that the entries have been made in the regular course of business and have the necessary probative value. *Ganesh Parshad* v. *Narendra Nath.* **A I R 1953 S C 431.**

(848) *S. 32—General Principles.*

In the case of a dying declaration recorded by the Magistrate, where the exact words stated by a deceased matter and are of importance, a suggestion that the deceased might have said something by a mistake cannot be entertained. *Ram Nath* v. *State of Madhya Pradesh.* **A I R 1953 S C 420.**

(849) *S. 32—Proof and Corroboration.*

Unless one is certain about the exact words uttered by the deceased, no reliance should be placed on verbal statements of witnesses and the oral declarations made by the deceased. *Ram Nath* v. *State of Madhya Pardesh.* **A I R 1953 S C 420.**

(850) *S. 32—Evidentiary value of statements as to death.*

It is not safe to convict an accused person merely on the evidence furnished by a dying declaration without further corroboration because such a statement is not made on oath and is not subject to cross-examination

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and because the maker of it might be mentally and physically in a state of confusion and might well be drawing upon his imagination while he was making the declaration. *Ram Nath* v. *State of Madhya Pardesh.* **A I R 1953 S C 420.**

(851) *Ss. 34 and 90 — Loose sheets of account papers — Evidentiary ualue*

Where the accounts consist of loose sheets of papers they cannot have the same probative force of account books which are regularly kept in the course of business. Where the signature of a particular person is not in issue or sought to be established, S 90 cannot apply even if the accounts are old and produced from proper custody. *Ganesh Parshad* v. *Narendar Nath,* **A I R 1953 S C 431.**

(852) *S. 35 — Public document recitals in — Value of.*

Recital of ekrarnama and its terms in ancient public document like Rubakari whose authority has not been doubted furnishes a strong evidence of the existence and genuineness of the ekrarnama and its terms. *Bisvambhar Singh* v. *State of Orissa,* **A I R 1954 S C 139 =1954 S C R 842=1954 S C J 219.**

(853) S. 45—Opinion on typed document —Opinion of expert that a particular letter was typed on particular machine does not fall within ambit of S. 45 and is inadmissible. *Hanumant* v. *State of M. P.* **A I R 1952 S C 343 =1952 S C R 1091 =1952 S C J 509.**

(853A) *S. 45—Contradictory reports of chemical examiner — Onus on prosecution to explain the difference in reports.*

See Tulsi Ram Kanu v. The State A I R 1954 S C 1 under Criminal Procedure Code, S. 510.

(854) *S. 50 — Persons having special means of knowledge.*

A member of the family can speak in the witness box of what he has been told and what he has learned about his own ancestors, provided what he says is an expression of his own independent opinion (even though it is based on hearsay derived from deceased, not living, persons) and is not merely repetition of the hearsay opinion of others, and provided the opinion is expressed by conduct. His sources of information and the time at which he acquired the knowledge (for example, whether before the dispute or

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not) would affect its weight but not its admissibility. *Sita Ji* v. *Brijendra Narain Chouahry*, A I R 1954 S C 601.

(855) Ss. 65 and 63 — Secondary evidence — Foundation must be first laid for its reception. *Sital Das* v. *Sant Ram*, A I R 1954 S C 606.

(856) *S. 65 (a) — Transfer of Property Act (1882), S. 53A—Agreement of lease — Secondary evidence — Admissibility.*

Where the terms of a lease agreed to be granted are contained in the correspondence of the Government officials and the original not having been produced by the plaintiff in spite of notice to him under S. 66, Evidence Act, the secondary evidence of the same by producing a certified copy of the record can be adduced by the defendant in support of his defence of part performance. *Manek Lal* v. *H. J. Ginwalla & Sons*, A I R 1950 S C 1=1950 S C R 75 =1950 S C J 317.

(857) *S. 65 (b)—Secondary evidence — Objection to admissibility, at stage of Supreme Court appeal — (Civil P. C. (1908), S. 12).*

Secondary evidence admitted in High Court with consent of parties — Existence of original admitted by opposite party in one of his letters—Objection to admissibility not raised in memo of appeal to Supreme Court—Objection cannot be raised for first time in arguments before Supreme Court. *Biswambhar Singh* v. *State of Orissa*, A I R 1954 S C 139 =1954 S C R 842 =1954 S C J 219.

(858) *S. 67—Comparison of handwriting.*

Question whether particular letter was written by A — Conclusions based on mere comparison of handwriting must, at best, be indecisive, and yield to positive evidence. *Kishore Chandra* v. *Ganesh Prasad*, A I R 1954 S C 316.

(859) *S. 68 — Attestation — Proof of —(T. P. Act (1882), S. 3).*

Attesting witness deposing that he had attested the mortgage bond executed by *A* in favour of *B* and that other attestors also witnessed its execution—It is sufficient evidence of valid attestation. 35 Mad 607 (PC), Ref. *Kishore Chandra* v. *Ganesh Prasad*, A I R 1954 S C 316.

(860) *S. 80 — Certificate of Magistrate that deposition was read over — Presumption of correctness.*

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If the certificate of the committing Magistrate endorsed on the deposition sheet states that the deposition was read out to the witness and the witness admitted it to be correct, there is presumption of correctness under S. 80 of the Evidence Act until it is proved to be untrue. It is not necessary nor desirable to examine the committing Magistrate to prove the truth of his certificate. *Bhagwan Singh* v. *State of Punjab*, A I R 1952 SC 214=1952 S C J 284 =1952 S C R 812.

(861) *S. 90 — Presumption under — Production of copy — Presumption cannot be raised.*

The language of Section 90 requires the production of the particular document in regard to which the Court is invited to make the statutory presumption If the document produced is a copy, admissible as secondary evidence under S. 65 and is produced from proper custody and is over 30 years old, then only the signatures authenticating the copy may be presumed to be genuine; but production of a copy is not sufficient to raise the presumption of the due execution of the original. A I R 1935 P C 132, *Relied on. Sital Das* v. *Sant Ram*, A I R 1954 S C 606.

(862) *S. 92, Proviso 4 — Indian Registration Act 1908, S. 17 (1) (b)—Variance of terms in subsequent document—Limiting and extinguishing interest in immovable property whether equitable doctrine of part performance applies.*

See Kashinath Bhaskar Datar v. Bhaskar Vishweshwar Khare, A I R 1952 S C 153 under Registration Act.

(863) *S. 101 — Duty of prosecution — Silence of accused — (Criminal P. C. (1898), Ss. 244 and 286).*

If the prosecution evidence as a whole is unreliable and cannot be accepted as correct for specific reasons the silence of the accused can be of no avail to the prosecution, for such conduct of silence can never be permitted to become a substitute for proof by the prosecution. The substantive prosecution evidence being rejected as unworthy of credit, the alleged conduct must be referable to some innocent reason. Different persons react in different ways in similar circumstances and in the absence of satisfactory evidence the court ought not to treat the case as positively proved beyond reasonable doubt only by reason of the

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failure of the accused to put up his defence immediately when he was confronted. *Zwinglee Ariel* v. *State of Madha Pradesh*, **A I R 1954 S C 15.**

(864) *Ss. 101 to 103 — Ejectment suit — Plaintiff to succeed on the strength of his own title—Onus — How discharged.*

It is well established that the plaintiff in ejectment suit must succeed on the strength of his own title. This he can do by adducing sufficient evidence to discharge the onus that is on him, irrespective of whether the defendant has proved the validity of his case or not. A mere destruction of the defendant's title, in the absence of establishment of its own title carries the plaintiff nowhere. *M. M. B. Catholics* v. *M. P. Anthansius*, **A I R 1954 S C 526.**

(865) *Ss. 101 to 103—Essential Supplies (Temporary Powers) Act, (1946) Ss. 7, 15 — Burden of Proof.*

See Shrinivas Pannalal v. State of Madha Pradesh. A I R 1954 S C 23 under Essential Supplies (Temporary Powers) Act.

(866) *Ss. 101 to 103—Madras District Police Act, S. 44—Cessation to perform duties.*

Under S. 44 of the Madras District Police Act, it is the prosecution that has to make out the cessation of the appellant from duty to be intentional. No doubt in an ordinary case where no other special circumstances appear on the record, the Court might well assume, that cessation as a fact, was intentional cessation. But where other circumstances appear, the requisite intention has to be clearly made out. *S. A. A. Biyabani* v. *The State of Madras.* **A I R 1954 S C 645.**

(867) *Ss. 101 to 103—Consideration.*

Promissory note executed by *A*—Burden of proving that no consideration passed under it is on *A* who denies it—Admission by *A* in another deed that he had received the amount of the promissory note—Burden is on *A* to prove that the admission was made under a mistake and is not true. *Kishore Chandra* v. *Ganesh Prasad*, **A I R 1954 S C 316.**

(868) *Ss. 101 to 103—Death by lethal weapon—Proof.*

In a case where death is due to injuries or wounds caused by a lethal weapon, it is always the duty of the prosecution to prove by expert evidence that it was likely or at least possible for the injuries to have been caused with the weapon with which and

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in the manner in which they are alleged to have been caused. It is elementary that where the prosecution has a definite or positive case, it must prove the whole of the case. *Mohinder Singh* v. *The State*, **A I R 1953 S C 415.**

(869) *Ss. 101 to 103 and 114 Ill. (g)—Accounts and their non-production—(Civil P. C. (1908), O. 13, R. 2).*

Suit for recovery of amount due on basis of adjustment of accounts signed by defendant. Defendant denying correctness of amount found due. Defendant who is in possession of account books kept by him and from which the balance could be ascertained should produce them before Court. He cannot be heard to say, relying upon the abstract doctrine of onus of proof, that it was no part of his duty to produce them unless he was called upon to do so : A I R 1927 P C 6, *Rel. on. Hira Lal* v. *Badkulal*, **A I R 1953 S C 225 =1953 S C R 758 =1953 S C J 316.**

(870) *Ss. 101 to 103—Exemption from income-tax—Income-tax Act (1922), Ss. 10 (2) (xv), 66.*

Where the assessee claims an exemption of an amount, on the ground of its being an expenditure falling under S. 10 (2) (xv), the burden of proving the necessary facts in that connection is on the assessee. *I. T. Commr.* v. *Calcutta Agency*, **A I R 1951 S C 108 =1951 S C J 177 1950 S C R 1008.**

(871) *S. 112—Proof—Appeal.*

The presumption, which S. 112 contemplates, is a conclusive presumption of law which can be displaced only by proof of the particular fact mentioned in the section, namely, non-access between the parties to the marriage at a time when according to the ordinary course of nature the husband could have been the father of the child. Access and non-access connote existence and non-existence of opportunities for marital intercourse. Non-access can be established not merely by positive or direct evidence; it can be proved undoubtedly like any other physical fact by evidence either direct or circumstantial, which is relevant to the issue, though as the presumption of legitimacy is highly favoured by law, it is necessary that proof of non-access must be clear and satisfactory. The principle of

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English Common Law, according to which neither a husband nor a wife is permitted to give evidence of non-access, after marriage to bastardise a child born in lawful wedlock, does not apply to legitimacy proceeding in India.

Held on evidence of the case, that the father did not succeed in proving that there was no opportunity for intercourse between him and plaintiff's mother at the time when the plaintiff was conceived. *Venkateswarlu* v. *Venkatanarayana*,

A I R 1954 S C 176.

(872) *S. 114 — Lost grant — Presumption — (Transfer of Property Act (1882), S. 105)—(Limitation Act (1908), Arts. 131, 139, 144 — Suit for assessment of fair rent).*

When a person was found in possession and enjoyment of land for a considerable period of time under an assertion of title without challenge, Courts were inclined to ascribe a legal origin to such possession, and when on the facts a title by prescription could not be sustained, it was held that a presumption could be made that the possession was referable to a grant by the owner entitled to the land, but that such grant had been lost. It was a presumption made for securing ancient and continued possession, which could not otherwise be reasonably accounted for. But it was not a 'presumptio juris et de jure,' and the Courts were not bound to raise it, if the facts in evidence went against it. So also the presumption was not made if there was any legal impediment to the making of it. There will likewise be no scope for his presumption, if there is no person capable of making a grant, or if the grant would have been illegal and beyond the powers of the grantor. Case Law, *Rel. on.*

The plaintiff was the Mahant of a religious institution known as Rajgunj Asthal in Burdwan, and the suits were instituted by him to recover possession of various plots of land in the occupation of the defendants, or in the alternative, for assessment of fair and equitable rent. It was alleged in the plaints that the suit lands were comprised in Mouza Nala forming part of the permanently settled estate of Burdwan, and were Mal lands assessed to revenue, and that more than 200 years previously there had been a permanent Mokarrari grant of those lands by the Maharaja of Burdwan to the Rajgunj Asthal;

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that in the record of rights published during the settlement in 1931 they were erroneously described as rent free, and that on the strength of that entry the defendants were refusing to surrender possession of the lands to the plaintiff. The defendants contested the suits, and pleaded that the lands were not Mal lands, that they did not form part of the zamindari of Burdwan but had been granted as Lakheraj to their predecessors-in-title long prior to the permanent settlement, that neither the Maharaja of Burdwan nor the plaintiff claiming under him had any title to them, and that the entry in the record of rights in 1931 was correct. The defendants also pleaded that as they and their predecessors had been in possession of the lands for over 200 years under assertion of an adverse title, the claim of the plaintiff was barred by limitation.

The documents put forward by the defendants as containing assertions by them that they held under a Lakheraj grant were not shown to relate to the suit lands. There was no proof that the defendants set up any adverse title prior to 1931, much less that the plaintiff had knowledge of the same. There was the bare finding that the defendants and their predecessors in-title had been in possession for a long period without payment of rent; but here again, there was no finding as to the precise length of time during which they held possession. It had been found by the Lower Court that the suit lands were Mal lands within the zamindari of Burdwan, and that they had been settled on the plaintiff by the Maharaja of Burdwan:

Held (i) that when it was shown that lands in an estate were assessed, it must follow that they could not have been held on the date of the permanent settlement as Lakheraj. It would be inconsistent with the scheme of the settlement and S. 36 of Regulation No. 8 of 1793 to hold that the assessed or Mal lands in an estate could have been held on an anterior Lakheraj grant. It had been found that the lands were part of the Mal lands within the zamindari assessed to revenue, and in view of that finding there was no scope for the presumption of a lost grant. From the entry in the record of rights in 1931 describing the lands as "Bhog Dakhal Sutra Niskar" it was clear that the entry in the record of rights in 1931 was made in compliance with R. 37 of the technical Rules and Instruction issued by the Settlement Department

and that what it imported was not that there was a rent-free grant, but that the person in possession was not actually paying rent. Whatever weight might attach to the word "Niskar" in a record of rights in other context, where the question was whether a presumption of a lost pre-settlement Lakheraj grant could be made, the inference to be drawn from that word could not outweigh the effect of the non-exclusion of the lands from the Mal or the regularly assessed estate. A presumption of lost grant could not be founded on the entry in the record of rights. On the facts found, no presumption of a lost grant could be made in favour of the defendants, and that the plaintiff was entitled to assessment of fair and equitable rent on the holdings in their possession : A I R 1951 Cal 385, *Reversed.*

(ii) Non-payment of rent for a considerable but unascertained period of time, in itself, was not sufficient to make possession of the defendants adverse.. It was only in 1931 that the defendants could be said clearly to have asserted a hostile title, and the suits brought within 12 years from the date was within time under Art. 131. *Manohar Dass* v. *Charu Chandra,*

A I R 1955 S C 228.

(873) *S. 114 — Lost grant — Presumption.*

Before raising a presumption of lost grant it must be established that the grant was one which could have legally been made by the party. It is well settled that it is beyond the powers of a manager of a religious institution to grant perpetual lease binding the institution for all times to a fixed rent, unless there is a compelling necessity or benefit therefor. Where what is pleaded is not even so much as a permanent lease, because there is neither premium paid nor rent reserved but a Lakheraj grant unsupported by any consideration, that would clearly be beyond the powers of a Mahant, and no presumption of a lost grant could be made in respect thereto. A. I. R. 1917 P. C. 33; (1821) 106 E. R. 1048; (1852) 118 E. R. 108, Rel. on. *Manohar Dass* v. *Charu Chandra,*

A I R 1955 S C 228.

(874) *S. 114 — Continuous cohabitation of man and woman as husband and wife — Presumption as to marriage—Rebuttal.*

Continuous cohabitation of a man and a woman as husband and wife and their treatment as such for a number of years

may raise the presumption of marriage. But the presumption which may be drawn from long cohabitation is rebuttable, and if there are circumstances which weaken or destroy that presumption, the Court cannot ignore them.

Held on a consideration of the evidence in the case that such circumstances were not wanting and their cumulative effect warranted the conclusion that the plaintiff had failed to prove the factum of his marriage. *Gogal Chand* v. *Parvin Kumari,*

A I R 1952 S C 231
=1952 S C J 331.

(875) *S. 114, Illus. (a)—Scope—Possession of ornaments of murdered person — Time factor — Importance of.*

The presumption permitted to be drawn under section 114, illustration (a), Evidence Act, has to be read along with the important time factor. If ornaments or things of the deceased are found in the possession of a person soon after the murder, a presumption of guilt may be permitted. But if several months expire in the interval, the presumption may not be permitted to be drawn having regard to the circumstances of the case. *Tulsi Ram* v. *The State,*

A I R 1954 S C 1
=1953 S C J 612.

(876) *S. 115 — Estoppel and res judicata — (Civil P. C. (1908), S. 11).*

Estoppel is a rule of evidence and the general rule is enacted in S. 115 of the Evidence Act. This is the rule of estoppel by conduct as distinguished from an estoppel by record which constitutes the bar of res judicata. *Sunderabai* v. *Deva Ji*

A I R 1954 S C 82.

(877) *Ss. 133, 114 — Evidence of raped child — Corroboration — Rule as to necessity.*

The rule, which according to the cases has hardened into one of law, is not that corroboration is essential before there can be a conviction .but that the necessity of corroboration, as a matter of prudence, except where the circumstances make it safe to dispense with it, must be present to the mind of the Judge, and in jury cases must find place in the charge, before a conviction without corroboration can be sustained. The tender years of the child which is the victim of a sexual offence, coupled with other circumstances appearing in the case such, for example, as its demeanour, unlikelihood

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of tutoring and so forth, may render corroboration unnecessary but that is a question of fact in every case. The only rule of law is that this rule of prudence must be present to the mind of the judge or the jury as the case may be and be understood and appreciated by him or them. There is no rule of practice that there must, in every case, be corroboration before a conviction can be allowed to stand: (1916) 2 K. B. 658, *Rel. on.*

Further, when corroborative evidence is produced it also has to be weighed and in a given case, as with other evidence even though it is legally admissible for the purpose on hand, its weight may be nil. *Rameshwar Kalyan Singh* v. *State of Rajasthan*, A I R 1952 S C 54 = 1952 S C R 377 = 1952 S C J 46.

(878) *S. 133 — Evidence of accomplice — Corroboration — Nature and extent of — Rules as to.*

It would be impossible, indeed it would be dangerous, to formulate the kind of evidence which should, or would, be regarded as corroboration. Its nature and extent must necessarily vary with the circumstances of each case and also according to the particular circumstances of the offence charged. But to this extent the rules are clear :—

(1) It is not necessary that there should be independent confirmation of every material circumstance in the sense that the independent evidence in the case, apart from the testimony of the complainant or the accomplice, should in itself be sufficient to sustain conviction. All that is required is that there must be some additional evidence rendering it probable that the story of the accomplice (or complainant) is true and that it is reasonably safe to act upon it.

(2) The independent evidence must not only make it safe to believe that the crime was committed but must in some way reasonably connect or tend to connect the accused with it by confirming in some material particular the testimony of the accomplice or complainant that the accused committed the crime.

(3) The corroboration must come from independent sources and thus ordinarily the testimony of one accomplice would not be sufficient to corroborate that of another.

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(4) The corroboration need not be direct evidence that the accused committed the crime. It is sufficient if it is merely circumstantial evidence of his connection with the crime. *Rameshwar Kalyan Singh* v. *State of Rajasthan*, A I R 1952 S C 54 = 1952 S C R 377 = 1952 S C J 46.

(879) *S. 133—Mother of raped child — If, independent witness for corroboration purposes.*

It may be that all mothers may not be sufficiently independent to fulfil the requirements of the corroboration rule but there is no legal bar to exclude them from its operation merely on the ground of their relationship. Independent merely means independent of sources which are likely to be tainted. *Rameshwar Kalyan Singh* v. *State of Rajasthan*, A I R 1952 S C 54 =1952 S C R 377=1952 S C J 46.

(880) *S. 115—Abandonment.*

Facts on record not sufficient to sustain plea of waiver, acquiescence or estoppel — Plea of abandonment of right which is an aggravated form of waiver, acquiescence or laches and akin to estoppel cannot be sustained on self-same facts. (1876) 1 A C 39, *Rel. on.*; A I R 1951 Mad 572, *Reversed. Sha Mul Chand & Co.* v. *Jawahar Mills Limited.* A I R 1953 S C 98 =1953 S C R 351=1953 S C J 68.

(881) *S. 115—Abandonment.*

Mere waiver, acquiescence or laches not amounting to an abandonment of his right or to an estoppel against a person cannot disentitle that person from claiming relief in equity in respect of his executed and not merely executory contract. (1876) 1 A C 39, *Rel. on.*; AIR 1951 Mad 572, *Reversed. Sha Mul Chand & Co.* v. *Jawahar Mills Limited.* A I R 1953 S C 98 =1953 S C R 351=1953 S C J 68.

(882) *S. 118—Competency—Evidence of child – Omission to certify that the child understands the duty of speaking truth.*

An omission to administer an oath, even to an adult, affects the credibility of the witness and not his competency. The question of competency is dealt with in S. 118. Every witness is competent unless the Court considers he is prevented from understanding the question put to him, or from giving rational answers by reason of tender years, extreme old age, disease whether of body or mind, or any other cause of the same kind. It is desirable that Judges and Ma-

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gistrates should always record their opinion that the child understands the duty of speaking the truth and state why they think so, otherwise the credibility of the witness may be seriously affected, so much so, that in some cases it may be necessary to reject the evidence altogether. Whether the Magistrate or Judge really was of that opinion can, however, be gathered from the circumstances when there is no formal certificate. *Rameshwar* v. *The State of Rajasthan*, **A I R 1952 S C 54 =1952 S C J 46=1952 SC R 377.**

(883) *S. 122—Communication.*

The statements of the accused to his wife that he would give her jewels and he had gone to the house of the deceased to get them are inadmissible under S. 122. But the wife's statement that the accused was seen in the early hours, while it was dark, coming down the roof of his house, that he went to the bhusa kothri and came out again and had a bath and put on the dhoti again, is not inadmissible under S. 122 as it has reference to acts and conduct of the accused and not to any communication made by him to his wife. *Ram Bharosey* v. *State of U. P.*, **A I R 1954 S C 704.**

(884) *S. 145—Inquest report—(Criminal P. C. (1898), S. 174).*

It is questionable how far an inquest report is admissible except under S. 145 of the Evidence Act. *Dhirendar Chandar* v. *Associated Bank of Tripura*, **A I R 1955 S C 215.**

(885) *S. 145 — Object of—Substantial compliance—What is.*

There can be no hard and fast rule as regards the compliance with the requirements of S. 145. All that is required is that the witness must be treated fairly and be afforded a reasonable opportunity of explaining the contradictions after his attention has been drawn to them in a fair and reasonable manner. The matter is one of substance and not of mere form.

Thus, where the witness is questioned about every material passage in his previous statement, point by point, there is a substantial compliance with what S. 145 requires. *Bhagwan Singh* v. *State of Punjab*, **A I R 1952 S C 214 =1952 S C R 812=1952 S C J 284.**

(886) *S. 145 — Statements of witnesses made during investigation of offence.*

Section 145 does not help the accused to obtain copies of the statements of witnesses made during investigation of an offence though it enables him to make use of the statements if he happens to be in possession of them. *Purshottam* v. *State of Kutch*, **A I R 1954 S C 700.**

(887) *S. 157—'At or about the time' — Meaning of.*

There can be no hard and fast rule about the 'at or about' condition in S. 157. The main test is whether the statement was made as early as can reasonably be expected in the circumstances of the case and before there was opportunity for tutoring or concoction. *Rameshwar Kalyan Singh* v. *State of Rajasthan*, **A I R 1952 S C 54 =1952 S C R 377=1952 S C J 46.**

(888) *S. 157 — Previous statement of accomplice — Admissibility as corroboration.*

Provided the condition prescribed by S. 157, Evidence Act, that is to say, "at or about the time etc." are fulfilled there can be no doubt that a previous statement by an accomplice or a complainant is legally admissible in India as corroboration. The weight to be attached to it is, of course, another matter and it may be that in some cases the evidentiary value of two statements emanating from the same tainted source may not be high, but in view of S. 118, its legal admissibility as corroboration cannot be questioned. *Rameshwar Kalyan Singh* v. *State of Rajasthan*, **A I R 1952 S C 54 =1952 S C R 377=1952 S C J 46.**

Excess Profits Tax Act (1940)

EXCESS PROFITS TAX ACT (1940)

(889) *S. 2 (5)—"Business" Interpretation of.*

'Business' as defined in S. 2 (5) of the Excess Profits Tax Act includes amongst others, any trade, commerce or manufacture or any adventure in the nature of trade, commerce or manufacture. The first part of this definition of 'a business' in the Excess Profits Tax Act is the same as the definition of a business in S. 2 (4) of the Income-tax Act. Whether a particular activity amounts to any trade, commerce or manufacture or any adventure in the nature of trade, commerce or manufacture is always a difficult question to answer. The question whether a particular source of income is business or not must be decided according to our ordinary notions as to what a business is. No general principle can be laid

down which will be applicable to all cases; each case must be decided on its own circumstances according to ordinary common sense principles.

(Note: In the facts and circumstances of this case it was held that the letting out by the assessee firm of the plant, machinery, etc., on an annual rent of Rs. 40,000 could not, when its normal business activity had come to a close, be held to fall within the body of the definition of "business". *Narain S. W. Mills* v. *I.-T. Commr*,

A I R 1955 S C 176.

(890) *S. 2 (5)—"Business'—Interpretation of.*

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A I R 1955 S C 176.

(891) *S. 2 (5)—Business — Activities restricted only to one individual (Hyderabad Excess Profits Tax Regulation, S. 2 (4)).*

The activities in order to constitute a business need not necessarily be concerned with several individuals or concerns. They would constitute business in spite of their being restricted to only one individual or concern. What is relevant to consider is what is the nature and scope of these activities though either by chance or design these might be restricted to only one individual or concern. It is the nature and scope of these activities and not the extent of the operations which are relevant for this purpose. *Laxminarayan Ram Ram Gopal and Sons* v. *Hyderabad Government*,

A I R 1954 S C 364.

(892) *S. 2 (5) — Business — Agency business by limited company — When amounts to business — (Hyderabad Excess Profits Tax Regulation, S. 2 (4)).*

The activities which constitute carrying on business need not necessarily consist of activities by way of trade, commerce or manufacture or activities in the exercise of a profession or vocation. They may even consist of rendering services to others which services may be of a variegated character.

The objects of an incorporated company as laid down in the Memorandum of Association are certainly not conclusive of the question whether the activities of the company amount to carrying on of business. But they are relevant for the purpose of determining the nature and scope of such activities. *Case law referred.*

Thus, where the objects of a limited company inter alia were to act as agents for Governments or Authorities or for any bankers, manufacturers, merchants, shippers, Joint Stock Companies and others and carry on all kinds of agency business, there was a continuity of operations of the company in the general management of certain Mills, which work consisted of numerous operations and comprised of various services which were rendered by the company as the agents of the mills, the company was also entitled, though with the sanction or ratification by the Board of Directors, either before or after the dealings, to enter into dealings with the mills by way of sales and purchases of various commodities and there was nothing in the Agency Agreement to prevent the company from acting as the agents of other manufacturers, Joint Stock Companies etc. :

Held that all these factors taken into consideration along with the fixity of tenure, the nature of remuneration and the assign-

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ability of their rights are sufficient to enable the Court to come to the conclusion that the activities of the company as the agents of the mills constituted a business and the remuneration which the company received from the mills under the terms of the Agency Agreement was income, profits or gains from business. *Lakshminarayan Ram Ramgopal and Sons* v. *Hyderabad Government*, **A I R 1954 S C 364.**

(893) *S. 2 (5) — Profits from business — Profits earned by letting of machinery.*

If a commercial asset is not capable of being used as such, then its being let out to others does not result in an income which is the income of the business, but an asset which was acquired and used for the purpose of the business does not cease to be a commercial asset of that business as soon as it was temporarily put out of use or let out to another person for use in his business or trade. The yield of income by a commercial asset is the profit of the business irrespective of the manner in which that asset is exploited by the owner of the business. He is entitled to exploit it to his best advantage and he may do so either by using it himself personally or by letting it out to somebody else. A mere substituted use of the commercial asset does not change or alter the nature of that asset. Whatever the commercial asset produces is income of the business of which it is an asset, the process by which the asset makes the income being immaterial. The assessee was a manufacturer of silk cloth, and as a part of its business it installed a plant for dyeing silk yarn. During the chargeable accounting period (1-1-1943 to 31-12-1943) owing to difficulty in obtaining silk yarn on account of the war it could make no use of this plant and it remained idle for some time. On 20-8-1943 it was let out on a rent of Rs. 4,001 per month. The Excess Profits Tax Officer by his assessment order dated 11-6-1945 included the sum of Rs. 20,005 realized as rent for five months, in the profits of the business of the assessee and held that excess profits tax was payable on this amount :

Held that the dyeing plant had not become redundant for its business as a silk manufacturing concern, simply by the circumstance that for the time being it could not be used by the assessee personally for the purpose of dyeing silk yarn owing to the non-availability of yarn. It was a part of the

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normal activities of the assessee's business to earn money by making use of its machinery by either employing it in its own manufacturing concern or temporarily letting it to others for making profit for that business when for the time being it could not itself run it. The income earned by the assessee and received from the lessee was, therefore, chargeable to excess profits tax, *Case law referred*: A I R (36) 1949 Bom 12, REVERSED. *Commr. Excess Profits Tax* v. *Lakshmi Silk Mills*,

A I R 1951 S C 454 =1952 S C R 1=1951 S C J 730.

(894) *Ss. 2 (21) (c) and 6 — "A company the directors whereof have a controlling interest."*

In common parlance a person is said to have "a controlling interest" in a company when such a person acquires, by purchase or otherwise, the majority of the vote-carrying shares in that company, for the control of the company resides in voting powers of its share-holders. In this sense, the directors of a company may well be regarded as having "a controlling interest" in the company when they hold and are entered in the share register as holders of the majority of the shares which, under the Articles of Association of the company, carry the right to vote. (1923) 12 Tax Cas 573 and (1926) 12 Tax Cas 911, *Rel. on.*

It is not necessary that in order to have "a controlling interest" the person or persons who hold the majority of the vote-carrying shares must have a beneficial interest in the shares held by them. These persons may hold the shares as trustees and may even be accountable to their beneficiaries and may be brought to book for exercising their votes in breach of trust, nevertheless, as between them as share-holders and the company, they are the share-holders, and as such, have "a controlling interest" in the company. (1946) 14 I T R (Supp) 7 and A I R 1947 Bom 45, *Rel. on.*

In the case of directors, who hold the majority of shares as trustees, they, so far as the company is concerned, are the registered share-holders and the right to vote is vested in them, although as between them and their beneficiaries the beneficial interest is vested in the latter. They are the registered holders of the shares and the votes they cast are their own votes. But that case is different from the case of directors who

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are only the agents of the majority share-holders. When a share-holder holding the majority of shares authorises an agent to vote for him in respect of the shares so held by him, the agent acquires no interest, legal or beneficial, in the shares. The title in the shares remains vested in the share-holder. The share-holder may revoke the authority of the agent at any time. In spite of the appointment of the agent the share-holder may himself appear at the meeting and cast his votes personally. Therefore, the shares being always subject to his will and ordering, the controlling interest, which the holder of the majority of shares has, never passed to the directors who are the agents and hence the company of which they are the directors is not one in which the directors have a controlling interest so as to entitle it to claim that the statutory percentage, under S. 2 (21) of the Act, which should be applied to it, in computing the standard profit, is ten per cent. (1943) A C 335 and A I R 1950 Bom 391, *Distinguished*; (1949) 29 Tax Cas 395, *Rel. on. I. T. Commr.* v. *Jeewanlal Limited*,

A I R 1953 S C 473=1954 S C R 189.

(895) *S. 5—Proviso 3, S. 21— Income-tax Act (1922), S. 42 (3)—Separate business — Profits of part of business accruing or arising in Indian State — Assessee firm resident and registered in India under Income-tax Act having oil mill in Native State, manufacturing oil and selling same in British India — Business in Native State held part of assessee's business and separate business within Proviso 3 of S. 5.*

The assessees carried on business of manufacturing and dealing in oil during the relevant accounting periods. They were a registered firm under S. 26A, Income-tax Act and were residents in Bombay. They owned three mills at Bombay and one at Raichur (Hyderabad State) for manufacturing oil from ground nuts. The oil produced at Raichur was sold partly at Raichur and partly in Bombay. The question was in respect of their liability under the Excess Profits Tax Act for the oil manufactured at Raichur, but sold in Bombay. The assessees contended that in respect of such oil a portion of the profits earned by them was attributable to their business of manufacturing oil at Raichur and that portion of the profits should not be assessed to tax under the Excess Profits Tax Act. The contention was that the profits of a part of the business

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accrued in Raichur and to that extent that part of the business should be treated as a separate business and profits of that business should be deemed to accrue or arise in the State of Hyderabad and should be exempted from excess profit :

Held, that the manufacturing operations of the assessees at Raichur were a part of their business within meaning of S. 5, proviso 3 and that the profits of this part of the business accrued or arose at Raichur and were exempt from excess profits tax. *I. T. Commr.* v. *Ahmedbhai Umarbhai & Co*;

A I R 1950 S C 134 =1950 S C J 374=1950 S C R 335.

(896) *Ss. 8 and 7 — Change in persons carrying on a business — (Income tax Act (1922), S. 26) — (Hindu Law—Partnership Act (1940), Ss. 4, 5).*

A Hindu undivided family is no doubt included in the expression "person" as defined in the Indian Income-tax Act as well as in the Excess Profits Tax Act but it is not a juristic person for all purposes. The affairs of the Hindu undivided family are looked after and managed by its Karta. When to kartas of two Hindu undivided families enter into a partnership agreement the partnership is popularly described as one between the two kartas and the other members of the families do not 'ipso facto' become partners. There is, however, nothing to prevent the individual members of one Hindu undivided family from entering into a partnership with the individual members of another Hindu undivided family and in such a case it is a partnership between the individual members and it is wholly inappropriate to describe such a partnership as one between two Hindu undivided families.

Where the facts found by the Appellate Tribunal, in the statement of the case to the High Court and as is implicit in the question referred by it to the High Court, are that a business was carried on by a partnership composed of two partners each of which was an undivided family and that it was only from 14-4-1943 that it became a business of the eight individual members of the two disrupted families, that finding is binding on the assessee, and on that finding there can be no doubt that there had been a change in the persons carrying on the business within the meaning of S. 8 and the new business cannot claim to carry

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forward losses incurred by the old partnership under S. 7. *Kshetra Mohan* v. *E. P. T. Commr.* **A I R 1953 S C 516 =1953 S C J 734=1954 S C R 258.**

(897) *S. 10-A — Proof of existence of business is necessary before S. 10-A is applied.*

Where there is no business as is contemplated by the Act, then the Act does not apply and S. 10-A cannot come into operation at all. Before the Excess Profits Tax Officer can embark upon an enquiry as to whether a transaction was effected for the avoidance or reduction of liability to Excess Profits Tax and to make such adjustments as he considers appropriate there must be proof that the assessee was during the chargeable accounting period, carrying on any business of the kind referred to in S. 5 of the Act. *Narain S. W. Mills* v. *I. T. Commr.* **A I R 1955 S C 176.**

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(899) *Ss. 10-A, 4 & 2 (5) — Applicability.*

It is now well settled that, for the purposes of the Act, a business is a unit of assessment, and the charging section 4 provides for the tax being levied in respect of the profits of 'any business to which this Act applies'. Section 5 specifies the business to which the Act applies, and they are business 'of which any part of the profits made during the chargeable accounting period is chargeable to income-tax' by virtue of certain specified provisions of the Indian Income-tax Act, 1922. There are some provisos to this section, one of which excludes the application of the Act to any business the whole of the profits of which accrue or arise in a Part B State: the Act

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can, therefore, have no application to a business which did not make any profits 'during the relevant chargeable accounting period'. In other words, if a business, having been discontinued, earned no profit during the chargeable accounting period in question, no excess profits tax can be charged in respect of such business.

Whether the Act applies or not to a particular business must be determined solely with reference to section 5, and section 10-A must be construed as applicable only to case where, the business being found to be one to which the Act applies, a transaction of the kind referred to in the section has been effected. The proviso to section 2 (5) can operate in respect of business to which the Act applies and not otherwise.

"Where the old joint family business in Banaras brocade was wound up and was no longer carried on by the joint family as such during the relevant chargeable accounting period, the same business could not legally be treated as having continued unbroken in respect of such periods for the purpose of section 10-A of the Excess Profits Tax Act read with sections 4 & 5 of the same Act. *Sohan Pathak & Sons* v. *I. T. Commr.* **A I R 1953 S C 256=1953 S C J 630.**

(900) *Ss. 15 and 26 (3) — The word 'discovers' in S. 15 may relate to facts subsequent to chargeable accounting period —Relief granted under S. 26 (3)—Assessee utilising buildings, plants or machinery in business after termination of war—Excess Profits Tax Officer can proceed under S. 15.*

The word "discovers" in S. 15 of the Act is of sufficient amplitude to take in subsequent events which have a material bearing on the facts and circumstances on which assessment had been made or relief granted and is not limited to events which were in existence during the chargeable accounting period and when the Excess Profits Tax Officer finds that an assessee to whom relief had been granted under S. 26 (3) has utilised the buildings, plant or machinery in business after the termination of the war, he is entitled to proceed under S. 15 of the Act. **A I R 1953 Bom 88,** *Affirmed. India United Mills* v. *Commr of E. P. T.*, **A I R 1955 S C 79.**

(901) *Sch. 2, Rr. 2, 2-A — Borrowed money or debt.*

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Held, that the managing agency commission payable by the company to its managing agents for a certain year was not borrowed money for the purpose of R. 2-A but a debt for the purposes of R. 2. *Shree Ram Mills Ltd.* v. *Commr. of E. P. T.*,

A I R 1953 S C 485.

(902) *Sch. 2, R. 2-A — "Borrowed money."*

The appellants were the sole selling agents for yarn manufactured by a mill, distributing yarn to several constituents under forward contracts in respect of which they obtained advances of moneys from their constituents. Before 5-5-1944 the appellants had two accounts for each constituent namely, a "contract deposit account" and a "current yarn account," crediting the moneys received from the customers in the former account and transferring them to the yarn account in adjustment of the price of the bales supplied "then and there." The deposits received by the appellants from 5-4-1944 to 14-2-1945 were treated as advance payments in relation to each "contract number" and though the agreement provided for the payment of the price in full by the customer and for the deposit being returned to him on the completion of delivery under the contract, the transaction was one providing in substance and effect for the adjustment of the mutual obligations on the completion of the contract. For the period from 14-2-1945 to 12-4-1945 the amount deposited by a customer was no longer to have any relation to the price fixed for the goods to be delivered under a forward contract —either in instalments or otherwise. Such price was to be paid by the customer in full against delivery in respect of each contract without any adjustment out of the deposit, which was to be held by the appellants as security for the due performance of his contracts by the customer so long as his dealings with the appellants by way of forward contracts continued, the appellants paying interest at 3 per cent. in the meanwhile, and having the use of the money for their own business. It was only at the end of the "business connection" with appellants that an adjustment was to be made towards any possible liability arising out of the customer's default. Apart from such a contingency arising, the appellants undertook to repay an equivalent amount at the termination of the dealings :

Held, that the money deposited from 14-2-1945 to 12-4-1945 were borrowed money within R. 2-A but not the moneys deposited during the rest of the period. *Lakshmanier & Sons* v. *I. T. and E. P. T. Commr.*, **A I R 1953 S C 145.**

(903) *Sch. 2, R. 5—"So far as the contrary is shown."*

The word "deemed" clearly governs both clauses. In the same way, the words "except so far as the contrary is shown" govern both clauses. *Shree Ram Mills Ltd.* v. *Commr. of E. P. T.*,

A I R 1953 S C 485.

EXTRADITION ACT (1903)

(904) *S. 16—Extradition treaty between British Government and Tonk State — Treaty if subsists after State's merger — International law — Merger of State with another State —Effect.*

Per *Mukherjea, Mahajan, Fazl Ali and Das JJ.*—When a State relinquishes its life as such through incorporation into or absorption by another State either voluntarily or as a result of conquest or annexation, the treaties of the former are automatically terminated.

When as a result of amalgamation or merger, a State loses its full and independent power of action over the subject-matter of a treaty previously concluded, the treaty must necessarily lapse.

The Extradition treaty between the Tonk State and the British Government in 1869 is not capable of being given effect to in view of the merger of the Tonk State in the United State of Rajasthan. *Ram Babu Saksena* v. *The State*,

A I R 1950 S C 155
=1950 S C J 406=1950 S C R 573.

(905) *Ss. 18 and 7—Extradition treaty — Extradition of Indian subject for offence not extraditable under treaty — If derogates from terms of treaty — S. 7 if excluded under S. 18 by reason of extradition treaty.*

Per *Kania C. J., Patanjali Sastri and Fazl Ali JJ.* — Extradition of an Indian subject under S. 7 for an offence which is not extraditable under the Extradition treaty entered into between the British Government and the Tonk State in 1869, is not, in any sense, a derogation from the provisions of the treaty which provides for the extradition of offenders for certain specified offences, assuming that the treaty

Factories Act (1934)
of 1869 still subsists after the accession of the Tonk State to the Dominion of India. It is not correct to say that, by providing for extradition for additional offences, the Act derogates from the rights of Indian citizens under the treaty or from the provisions of the treaty. *Ram Babu Saksena* v. *The State*, **A I R 1950 S C 155 =1950 S C J 406=1950 S C R 573.**

FACTORIES ACT (1934)

(906) *Ss. 49-A and 49-B — Industrial Disputes—Industrial Disputes Act (1947), Ss. 2(q) and 24—Textile Industry—Cessation of work by large number of workers for few hours as a result of concerted action —Notice not given—Illegal strike—Benefit of Holidays according to leave rules.*

See Buckingham and Carnatic Co. v. *Workers of Buckingham and Carnatic Company*, A I R 1953 S C 47 under Industrial Disputes Act.

FINANCE ACT (1950)

(907) *Ss. 2 and 13—Extent of operation of State Law—(General Clauses Act (1897) S. 6.)*

Section 13 saves the operation of the State law only in respect of 1948-49 or any earlier period which is the period not included in the previous year (1949-50) for the purposes of assessment for the year 1950 51. In other words, there remained no State law of income tax in operation, in any Part B State in the year 1949-50. And the words "or for any subsequent period" evidently were added with a view to catch the income of any broken period prior to 1st April 1950 which might otherwise escape assessment both under the repealed State law and the newly introduced Indian Act. Nor can S. 6 of the General Clauses Act, 1897 serve to keep alive the liability to pay tax on the income of the year 1949-50 assuming it to have accrued under the repealed State law, for a "different intention" clearly appears in Ss 2 and 13 of the Finance Act read together. A I R 1951 Raj 94 (2), *Reversed. Union of India* v. *Madan Gopal*,

A I R 1954 S C 158 =1954 S C R 541 =1954 S C J 110.

(908) *S. 13, Proviso—Validity—(Constitution of India, Art. 277).*

While Art. 277 undoubtedly authorises

General Clauses Act (1897)
the continued levy of taxes lawfully levied by the Government of the State before commencement of the Constitution and their application to the same purposes as before, even after the Constitution came into force, there is nothing in the Article to warrant any implication that such taxes should continue to be levied, assessed and collected by the same State authorities as before the Constitution. There is nothing in Art. 277 of the Constitution to preclude Parliament making a law providing for the levy and collection of income-tax and super tax under the Mysore Act through authorities appointed under the Indian Income-tax Act. Proviso to S. 13 of the Finance Act is therefore not ultra vires. *D. R. Madhavakrishniah* v. *Income-tax Officer Bangalore*, **A I R 1954 S C 163 =1954 S C R 537 =1954 S C J 120.**

FOREIGN EXCHANGE REGULATION ACT (1947)

(909) *S. 23, Constitution of India, Art. 20(2)—Prosecuted and punished — Gold Confiscated under Sea Customs Act (1878), S. 167 (8) — Prosecuted under Foreign Exchange Regulation Act (1947) S. 23 not barred.*

See Maqbool Hussain v. *State of Bombay*, A I R 1953 S C 325 under Constitution of India, Art. 20 (2).

FORWARD CONTRACTS

(910) *Prohibition of — Contract Act (1872), Ss. 222, 30, 23, 49—Suit for loss by agent against principal—Plea of suit —(C.P.C. (1908), S. 20).*

See Kishan Lal v. *Bhanwar Lal*, A I R 1954 S C 500 under Contract Act.

GENERAL CLAUSES ACT (1897)

(911) *Ss. 3 (8) (b) (ii) and 3 (60) (b) —Contract with Chief Commissioner in Part C State — (Government of Part C States Act 1951), S. 17)—(Representation of the People Act (1951), Ss. 7 (d) and 9).*

Section 3 (8) has not the effect of putting an end to the status of Part C States as independent units, distinct from the Union Government under the Constitution. It

merely recognises that those States are centrally administered through the President under Art. 239 of the Constitution and enacts that the expression "Central Government" should include the Chief Commissioner administering a Part C State under the authority given to him under Art 239. Section 3 (8) does not affect the status of Part C States as distinct entities having their own legislature and judiciary, as provided in Arts. 239 and 240 of the Constitution. Its true scope will be clear if, adapting it, for the words "Central Government" in S. 9 of Act No. 43 of 1951 the words "the Chief Commissioner acting within the scope of the authority given to him under Art. 239" are substituted. A contract with the Chief Commissioner under Part C State would, therefore, under S. 9 of Act 43 of 1951 read with S. 3 (8) of the General Clauses Act, be a contract with the Central Government, and would operate as a disqualification for election to either House of Parliament under Ss. 7 (d) and 9 of Act No. 43 of 1951, and it would be a disqualification under S. 17 of Act No. 49 of 1951 for election to the Legislative Assembly of the State. *Satya Dev* v. *Padam Dev*,

A I R 1955 S C 5.

(912) *S. 5—Promulgation and publication of Law—Necessity of — Difference between Acts and Orders in respect of publication.*

In the absence of any special law or custom, it would be against the principles of natural justice to permit the subject of a State to be punished or penalised by laws of which they had no knowledge and of which they could not even with the exercise of reasonable diligence have acquired any knowledge. Natural justice requires that before a law can become operative it must be promulgated or published. It must be broadcast in some recognisable way so that all men may know what it is; or, at the very least, there must be some special rule or regulation or customary channel by or through which such knowledge can be acquired with the exercise of due and reasonable diligence. In the absence therefore of any law, rule, regulation or custom, a law cannot come into being by merely passing a resolution without promulgation or publication in the Gazette or other means. Promulgation or publication of some reasonable sort is essential.

In this respect the difference between an Order and an Act is obvious. Acts of the Parliament are publicly enacted. The debates are open to the public and the Acts are passed by the accredited representatives of the people who in theory can be trusted to see that their constituents know what has been done. They also receive wide publicity in papers and, now, over the wireless. Not so Proclamations and Orders of appropriate authorities. There must therefore be promulgation and publication in their cases. The mode of publication can vary. But reasonable publication of some sort there must be : (1918) 1 K B 101 ; A I R (31) 1944 Nag 40 ; AIR (31) 1944 Sind 142 and A I R (32) 1945 Nag 218, *Ref. Mahajan Harla* v. *The State*,

A I R 1951 S C 467
=1951 S C J 735
=1952 S C R 110.

(913) *S. 8—Applicability of—Construction—Letters Patents.*

The canon of construction of statutes enunciated in S. 38, Interpretation Act, and reiterated with some modifications in S. 8, General Clauses Act, is one of the general application where statutes or Acts have to be construed and there is no reasonable ground for holding that that rule of construction should not be applied in construing the Charters of the different High Courts. These Charters were granted under statutory powers and are subject to the legislative power of the Indian Legislature. Assuming however that strictly speaking the provisions of the Interpretation Act and the General Clauses Act do not for any reason apply, there is no justification for holding that the principles of construction enunciated in those provisions have no application for construing these Charters. *N. S. Thread & Company* v. *James Chadwick & Brothers*,

A I R 1953 S C 357.

(914) *S. 10 — Industrial Disputes—Award—Time for making—Extension.*

See Vishwamitra Press v. *Workers of Vishwamitra Press*, A I R 1953 S C 41 under "Industrial Disputes."

(915) *S. 24 — Bombay Building (Control on Erection) Ordinance (1 of 1948), S. 1 (4)—Notification Under, datea 15.1.1948) — (Bombay Building) (Control on Erection) Act (31 of 1948), S. 16 (1).*

The notification issued on 15.1.1948 under S. 1 (4) of the Ordinance extended

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not only the provisions of the Ordinance to the other areas in the Bombay State to the extent indicated in the notification but also the provisions of Act 31 of 1948. *State of Bombay* v. *Pandurang*,

A I R 1953 S C 244.

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(916) Ss. 6 and 101—Penal Code (1860), Ss. 3 and 4 — 'Inter se' integration agreement, D/- 18.3.1948 executed by Rulers of Component States of Vindhya Pradesh, Arts. 6 and 9, Cl. (3) and Instrument of Accession, Dated 20-7-1948, Cl. 3 — Effect of — Authority of Rajapramukh to pass extra territorial laws — Amendment of Ss. 3 and 4, Penal Code, and S. 188, Criminal P. C. by Vindhya Pradesh Ordinance 48 of 1949 and Ordinance 28 of 1949 respectively was within the Legislative competence of the Rajapramukh of Vindhya Pradesh. *Shiv Bahadur Singh* v. *State of Vindhya Pradesh*,

A I R 1953 S C 394.

(917) S. 30 (1)—Contract to grant leases for quarrying lime stone is within purview of section. *Kalyanpur Lime Works* v. *State of Bihar*,

A I R 1954 S C 165=1954 S C R 958 = 1954 S C J 49.

(918) S. 92 (1)—India (Central Government and Legislature) Act (1946), Ss. 4, 4A —Indian Independence Act (1947), Ss. 9 and 19 (4) — Essential Supplies (Temporary Powers) Act (1946), S. 1 (3) — Applicability to Darjeeling district — Act was validly in force till 31-3-1950 in that District.

See under Essential Supplies (Temporary Powers) Act, S. 1 (3). *Joylal* v. *The State*.

A I R 1951 S C 484.

(919) *S. 100, Sch. 7 List I, Items 28, 53; List II, Items 1, 2, List III, Items 4, 15 — Bombay City Civil Court (40 of 1948), S. 3 — Act not ultra vires Bombay Legislature.*

The Bombay City Civil Court Act is not ultra vires the Provincial Legislature by reason of its being an encroachment by the Provincial Legislature upon the field of Legislation reserved for the centre under List I of Sch. 7 to the Government of India Act, 1935. *State of Bombay* v. *Narottamdas*, **A I R 1951 S C 69.**

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(920) *S. 100—Validity of Act impugned — Pith and substance should be enquired—(Constitution of India, Art. 246).*

The validity of an Act is not affected if it incidentally trenches on matters outside the authorised field, therefore it is necessary to enquire in each case what is the pith and substance of the Act impugned. If the Act, when so viewed, substantially falls within the powers expressly conferred upon the Legislature which enacted it, then it cannot be held to be invalid, merely because it incidentally encroaches on matters which have been assigned to another legislature. '(1937) A C 863; A I R (34) 1947 P C 60; A I R (36) 1949 F C 81; A I R (37) 1950 F C 69, *Ref. The State of Bombay* v. *F. N. Balsara*,

A I R 1951 S C 318 = 1951 S C J 478 = 1951 S C R 682.

(921) *S. 100 — Principles governing interpretation of Legislative Lists — Constitution of India, Art. 246.*

Of the principles which govern the interpretation of the Legislative Lists, one is that none of the items in each List is to be read in a narrow or restricted sense; and the second is that where there is a seeming conflict between an entry in List II and an entry in List I, an attempt should be made to see whether the two entries cannot be reconciled so as to avoid a conflict of jurisdiction; A I R (26) 1939 F C 1; A I R (32) 1945 P C 98, *Rel. on. The State of Bombay* v. *F. N. Balsara*,

A I R 1951 S C 318 = 1951 S C J 478 = 1951 S C R 682.

(922) S. 102—Defence of India Rules (1939), Rr. 81 B and 121—Non Ferrous Metal Control Order 1942, S. 2 — Proceedings of offence taken after expiry of Defence of India Act—Legality — Constitution of India, Art. 372 — General Clauses Act (1897), S. 6.

See State of U. P. v. *Jagmander Das.* A I R 1954 S C 683 under Non-Ferrous Metal Control Order.

(923) Ss. 104 and 299 (2) — Madras Electricity Supply Undertakings (Acquisition) Act (43 of 1949) — Validity.

See Rajahmandry Electricity Supply Corporation Ltd. v. *State of Andhra.* A I R 1954 S C 251 under Madras Electricity Supply Undertaking (Acquisition) Act.

(924) *S. 108 — Range and ambit of power conferred on High Court—(Letters Patent (Cal) Cl. 15).*

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The range and ambit of the power conferred on the High Court by S. 108, Government of India Act of 1915 is not limited by the provision of S. 106 (1) of the Act or by the provisions of Cl. 16 of the Letters Patent. Section 108 is an enactment by itself and is unrestricted in its scope, and covers a much wider field than is covered by S. 106, Government of India Act; it confers a power on the High Court to make rules in respect not only of the jurisdiction that it enjoyed in 1915 but it also conferred power on it to make rules in respect of jurisdiction which may hereafter be conferred on it by the enactments enacted by the Governor-General in Legislative Council. I L R (1946) 2 Cal 359: A I R 1947 Cal 49: 51 Cal W N 42, *Overruled. N. S. Thread and Company* v. *James Chadwick and Brothers*,

A I R 1953 S C 357.

(925) *S. 226 — Jurisdiction of High Court to order Revenue Authority to state case under S. 57, Stamp Act — Stamp Act (1899), S. 57—(Specific Relief Act (1877), S. 45).*

The High Court has jurisdiction to order the Revenue Authority to state a case under S. 57 (1), Stamp Act. The jurisdiction of the Court is not excluded by S. 226, Government of India Act 1935. The order of the High Court to a Revenue Authority to do his statutory duty would not be the exercise of original jurisdiction in any matter concerning the revenue. It is only asking the Revenue Authority to perform his statutory duty. The fact that the proceedings in the case had passed beyond the stage of assessment and had reached the stage of enforcing payment is again irrelevant because by the relief when granted by the High Court no attempt is made to obstruct the Revenue Authority in the discharge of his duties: A I R (35) 1948 Bom 254, *Affirmed. C. C. Revenue Authority* v. *M. S. Mills.*

A I R 1950 S C 218 = 1950 S C J 444 = 1950 S C R 536.

(926) *S. 240 — Discharge from Service after one month notice according to agreement—Section is not contravened—(Constitution of India, Art. 311).*

Where a Railway employee is discharged from service after giving one month's notice according to terms of his agreement of service, he cannot be heard to complain that no charge-sheet had been formulated against him and proceedings had not been

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taken thereunder as required by S. 240 of the Government of India Act, 1935. *Gopal Krishna Potnay* v. *Union of India*,

A I R 1954 S C 632.

(927) *S. 240 (1)—'Holds office during His Majesty's pleasure'—Origin and scope of the rule — Remedies of civil servants in India.*

The expression 'Holds office during His Majesty's pleasure' concerns itself with the tenure of office of the civil servant and it is not implicit in it that a civil servant serves the Crown 'ex gratia' or that his salary is in the nature of a bounty. It has again no relation or connection with the question whether an action can be filed to recover arrears of salary against the Crown.

The rule that a civil servant holds office at the pleasure of the Crown has its origin in the Latin phrase "durante bene placito" ("during pleasure") meaning that the tenure of office of a civil servant, except where it is otherwise provided by statute, can be terminated at any time without cause assigned. The true scope and effect of this expression is that even if a special contract has been made with the civil servant the Crown is not bound thereby. In other words, civil servants are liable to dismissal without notice and there is no right of action for wrongful dismissal, that is, that they cannot claim damages for premature termination of their services. 1895 A C 229 and (1896) 1 Q B 116, *Ref.*

But this rule of English law has not been fully adopted in S. 240. Section 240 itself places restrictions and limitations on the exercise of that pleasure and those restrictions must be given effect to. They are imperative and mandatory. It follows therefore that whenever there is a breach of restrictions imposed by the statute, by the Government or the Crown the matter is justiciable and the party aggrieved is entitled to suitable relief at the hands of the court.

Further, there is no warrant for the proposition that the relief must be limited to the declaration and cannot go beyond it. To the extent that the rule that Government servants hold office during pleasure has been departed from by the statute, the Government servants are entitled to relief like any other person under the ordinary law, and that relief therefore must be regulated by

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the Code of Civil Procedure. *State of Bihar* v. *Abdul Majid*, **A I R 1954 S C 245 =1954 S C R 786 =1954 SCJ 300.**

(928) *S. 240—Right of Public servant to sue for arrears of salary.*

The rule of English law that a civil servant cannot maintain a suit against the State or against the Crown for the recovery of arrears of salary does not prevail in this country. It has been negatived by the provisions of the Statute law in India.

Thus the Code of Civil Procedure from 1859 right up to 1908 has prescribed the procedure for all kinds of suits and S. 60 and the provisions of O. 21 substantially stand the same as they were in 1859 and those provisions have received recognition in all the Government of India Acts that have been passed since the year 1858. The salary of its civil servants in the hands of the Crown has been made subject to the writ of civil court. It can be seized in execution of a decree attached. It is thus difficult to see on what grounds the claim that the Crown cannot be sued for arrears of salary directly by the Civil Servant, though his creditor can take it, can be based or sustained. What could be claimed in England by a Petition of Right can be claimed in this country by ordinary process. A I R 1947 F C 23 *Rel. on.* A I R 1948 P C 121 and A I R 1942 F C 3, *Explained and distinguished. State of Bihar* v. *Abdul Majid*, **A I R 1954 S C 245 =1954 S C R 786 =1954 S C J 300.**

(929) *S. 240 — Discharge from service after one month's notice according to agreement — Section is not contravened—(Constitution of India, Art. 311).*

Where a Railway employee is discharged from service after giving one month's notice according to the terms of his agreement of service, he cannot be heard to complain that no charge-sheet had been formulated against him and proceedings had not been taken thereunder as required by S. 240 of the Government of India Act, 1935. *M. B. Cotton Association Ltd.* v. *Union of India*, **A I R 1954 S C 634.**

(930) *S. 290A—Validity of.*

Section 290A added to the Government of India Act, 1935 by the Constituent Assembly in its sovereign capacity and assented to by the President of the Assembly

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is a valid piece of legislation even though the assent of the Governor-General was not obtained in respect of it. *State of Seraikella* v. *Union of India*, **A I R 1951 SC 253 =1951 S C J 425 =1951 S C R 474.**

(931) *S. 297(1)(a)—Applicability to Act made by virtue of Sch. VII List II Entry 31 —(Constitution of India, Art. 286).*

Section 297 (1) (a) refers to "trade and commerce within the province", which is the subject of entry 27 of List II and to "production, supply and distribution of commodities," which is the subject of entry 29 of List II. The provision virtually means that import or export from a Province of goods of any class or description cannot be prohibited or restricted on the ground that it will affect trade and commerce within the Province or the production, supply and distribution of commodities. If therefore by any law framed by a Provincial Legislature relating to or based on the subjects of entry 27 or entry 29 of List II, the entry into or export from the Province of any goods is prohibited or restricted, such a law will be invalid. But to a law which is claimed to have been made and was made by virtue of entry 31 of that List and certain other entries therein S. 297 (1) (a) has no application. A I R (29) 1942 F C 33, *Rel. on. The State of Bombay* v. *F. N. Balsara*, **A I R 1951 S C 318 =1951 S C J 478 =1951 S C R 682.**

(932) *S. 299 — Compulsory acquisition —Right how to be exercised.*

Compulsory acquisition of property is undoubtedly an important sovereign right of the State but this right has to be exercised under a law. *R. E. C. Corporation* v. *State of Andhra*, **A I R 1954 S C 251.**

(933) *Sch. 7—Different topics in same legislative List — Interpretation.*

Per *Fazl Ali J.* — The scheme followed in the three legislative Lists seems to be that each particular entry should relate to a separate subject or group of cognate subjects, each subject or group of subjects being independent of the others (subject only to incidental overlapping).

Per *Das J.* — The different topics in the same legislative List should not be read as exclusive of one another. As there can be no question of conflict between two items in the same List, there is no warrant for res-

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tricting the natural meaning of one for the simple reason that the same subject might in some aspect come within the purview of the other. *State of Bombay* v. *Narottamdas*,

A I R 1951 S C 69
=1951 S C J 103
=1951 S C R 51.

(934) *Sch. VII, List I, Entry 19 — Doctrine of "Original package" — Applicability in India—(Constitution of India, Sch. VII, List I, Entry 41).*

What is known as the "original package" doctrine was evolved in America, which was applied not only to commodities imported from foreign countries but also to commodities which were the subject of inter-state commerce. This doctrine laid down that importation was not over so long as the goods were in the original package and hence a State had no power to tax imports until the original package was broken or there was one sale while the goods were still in the original package.

This doctrine has no place in India, having regard to the scheme of legislation that has been outlined in the Government of India Act, 1935 and in the present Constitution, in which the various entries in the Legislative Lists have been expressed in clear and precise language. Under the provision of Government of India Act, a limited meaning must be given to the word "import" in entry 19 of List I in order to give effect to the very general words used in entry 31 of List II : A I R (29) 1942 F C 33, *Ref. State of Bombay* v. *F. N. Balsara*,

A I R 1951 S C 318
=1951 S C J 478
=1951 S C R 682.

(935) *Sch. VII, List I, Entry 19 and List II, Entry 31 — Conflict between, whether exists — Bombay Prohibition Act (25 of 1949) whether encroaches upon List I, Entry 19—(Constitution of India, Sch. VII, List I, Entry 41 and List II, Entry 8).*

The words "possession and sale" occurring in entry 31 of List II are to be read without any qualification whatsoever. Under that entry the Provincial Legislature has the power to prohibit the possession, use and sale of intoxicating liquor absolutely. The word "import" in entry 19 of List I standing by itself does not include either sale or possession of the article imported into the country by a person residing in

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the territory in which it is imported. There is thus no real conflict between entry 31 of List II and entry 19 of List I. Hence the Bombay Prohibition Act in so far as it purports to restrict possession, use and sale of foreign liquor, is not an encroachment on the field assigned to the Federal Legislature under entry 19 of List I : A I R (37) 1950 F C 69, *Rel. on. The State of Bombay* v. *F. N. Balsara*,

A I R 1951 S C 318
=1951 S C J 478
=1951 S C R 682.

(936) *Sch. VII, List II, Entry 31 — "Liquor" includes all liquids containing alcohol — Bombay Prohibition Act (25 of 1949), S. 2 (24)—(Constitution of India, Sch. VII, List II, Entry 8).*

The word "liquor" covers not only those alcoholic liquids which are generally used for beverage purposes and produce intoxication, but also all liquids containing alcohol. It may be that the latter meaning is not the meaning which is attributed to the word "liquor" in common parlance especially when that word is prefixed by the qualifying word "intoxicating" but having regard to the numerous statutory definitions of that word in the Excise and Abkari Acts, such a meaning could not have been intended to be excluded from the scope of the term "intoxicating liquor" as used in entry 31 of List II: A I R (38) 1951 Bom 210 (F B), *Reversed*, *The State of Bombay* v. *F. N. Balsara*,

AIR 1951 S C 318=1951 S C J 478
=1951 S C R 682.

(937) *Sch. 7, List II, Entry 48 — Imposition of tax on purchasers under Madras Act, 9 of 1939 — Validity—(Constitution of India, Seventh Schedule, List II, Entry 54) — (Sales Tax — Madras General Sales Tax Act (9 of 1939), S. 1).*

Entry 48 in List II of the Seventh Schedule to the Government of India Act, on a proper construction, was wide enough to cover a law imposing tax on the purchaser of goods as well and the Constituent Assembly in Entry 54 of List II in the Seventh Schedule to the Constitution accepted this liberal construction of the corresponding entry 48 and expressed in clearer language which was implicit in that corresponding entry. The constitutionality of the Madras General Sales Tax Act (9 of 1939), cannot, therefore, be impugned on the ground that the Provincial Legislature had no power under the Government of India Act

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of 1935 to enact a law imposing a tax on purchasers : A I R 1953 Mad 105, *Affirmed. V. M. Sayed Mohammad & Co.* v. *State of Andhra,* **A I R 1954 S C 314 =1954 S C J 390.**

(938) *Sch. VII, List 2, Item 27—Competency of Provincial Legislature to legislate West Bengal Jute Goods Future Ordinance (5 of 1949)—(Constitution of India, Sch. VII, List II, Entry 26).*

As the West Bengal Jute Goods Future Ordinance, 1949 came within Head 27 of List 2 of the Seventh Schedule of the Government of India Act :— "Trade and commerce with the Province; markets and fair; money-lending and money-lenders," the then Provincial Legislature was competent to legislate on that topic : A I R 1952 Cal 740 (S B), *Affirmed. Duni Chand* v. *Bhuwalka Bros.,* **A I R 1955 S C 182.**

(939) *Sch. VII, List 2, Item 27—Competency of Provincial Legislature to legislate West Bengal Jute Goods Future Ordinance (5 of 1949)—(Constitution of India, Sch. VII, List II, Entry 26).*

As the West Bengal Jute Goods Future Ordinance, 1949 came within Head 27 of List 2 of the Seventh Schedule of the Government of India Act :— "Trade and commerce with the Province; markets and fair; money-lending and money-lenders," the then Provincial Legislature was competent to legislate on that topic : A I R 1952 Cal 740 (S B), *Affirmed, Duni Chand* v. *Bhuwalka Brothers,*

A I R 1955 S C 182.

GOVERNMENT OF PART C STATES ACT (49 of 1951)

(940) *Ss. 8 and 17—Omission of Part II of the Representation of the People Act, 1951 under S. 8 of the Act 49 of 1951—Effect of, on applicability of Representation of the People Act (1951), S. 7.*

Taking into consideration the general scheme of Act 49 of 1951, it is not possible to read into the omission of Part II of Act 43 of 1951 under S. 8 of Act 49 of 1951, an intention that the qualifications mentioned in S. 7 of Act 43 of 1951 should not apply to elections held under Act 49 of 1951. Nor is there any inconsistency between S. 8 of Act 49 of 1951 which passively omits Part II, and S. 17 of the said Act which positively enacts that what would be a disqualification under Art. 102 of the Constitution of India would be a disqualification for the purpose of Act 49 of 1951.

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The contention, that if S. 7 of Act 43 of 1951 could be construed as comprised in S. 17 of Act 49 of 1951, it should also be held to have been comprised in S. 11 of Act 43 of 1951, in which case, there was no need to enact two provisions in the same Act, one overlapping the other, is not sound as it fails to give any meaning to the words "disqualified for being chosen as a member of either House of Parliament" in S. 17. The scope of S. 7 of Act 43 of 1951 and that of Art. 102, Constitution of India, which is incorporated by reference in S. 11 of Act 43 of 1951 are different. It must be noted that S. 11 occurs in a Chapter which deals exclusively with qualifications and disqualifications for membership to electoral college in Part C States. It is, therefore, not possible to draw any inference from the non-inclusion of S. 7 in S. 11 or vice versa. The result is that the qualifications laid down in S. 7 of Act 43 of 1951 must be held to be comprised within S. 17 of Act 49 of 1951. *Satya Dev* v. *Padam Dev,* **A I R 1954 S C 587 =1954 S C J 764.**

(941) *S. 17—Interpretation of S. 17—Applicability of Representation of People Act (43 of 1951), S. 7 (d)—(Constitution of India, Art. 102 (1) (e)).*

Section 17 of Act 49 of 1951 does not enact that persons who are disqualified under a law made by Parliament shall be disqualified to be chosen under the Act. What it does enact is that if a person would be disqualified to be chosen to either House under an Act of Parliament, he would be disqualified to be chosen for the Part C State Assembly. In other words, what would be a disqualification for a candidate being chosen to either House of Parliament would be a disqualification to be chosen to the Part C State Legislature. In this view, it is of no consequence that the candidate was not disqualified under S. 7 (d) of the Representation of the People Act, 1951 by its own force. *Satya Dev* v. *Padam Dev,* **A I R 1954 S C 587 =1954 S C J 764.**

(942) *S. 17 — Candidate for election interested in contract with Part C State Government — Disqualification for being chosen to State Assembly—(Representation of the People Act (43 of 1951), S. 7 (d)).*

Adopting the test that what would be a disqualification for being a member of either House of Parliament under Art. 102, Con-

stitution of India would under S. 17 of Act 49 of 1951 be disqualification for being chosen to the Part C State Assembly, to operate as a disqualification for being chosen to the said State Assembly the contract contemplated by Art. 102 (1) (e) read with S. 7 of Act 43 of 1951 must be with the Central Government. Where, therefore, the contract is with a Part C State Government, a candidate who is alleged to be concerned with such a State Government contract is not a person who would be disqualified for being elected to either House of Parliament, and would in consequence be not disqualified for being elected to the Part C State Legislative Assembly.

It may seem anomalous that while under Ss. 7 (d) and 9 (1) of Act 43 of 1951 a contract with the State would operate as a disqualification for being chosen to the State Legislature and a contract with the Central Government would operate as a disqualification for being chosen to either House of the Parliament, the candidate should be held to be not disqualified for election to the Part C State Legislature when he holds a contract with the State Government. But that is because S. 7 (d) of Act 43 of 1951 is not in terms expended to elections in Part C States, and comes in only with the qualifications mentioned in S. 17 of Act 49 of 1951. *Satya Dev* v. *Padam Dev*,

AIR 1954 SC 587=1954 SCJ 764.

GRANT

(943) *Inam grant — Construction — (Hindu Law — Religious Endowment — Construction)—Appeal.*

Where the question was whether the Inam comprised the land itself or only of the melvaram interest in the properties inference that the Inam grant comprised only melvaram rights cannot be inferred from the fact that under column 7 of the Inam Register only the amount of assessment was set out: A I R 1948 Mad 72, *Ref. Satyanarayana* v. *Venkatapayya*,

AIR 1953 SC 195=1953 SCJ 283.

(944) *Lost grant — Presumption of title — (Evidence Act (1872), S. 114) — (Transfer of Property Act (1882), S. 105).*

A presumption of an origin in some lawful title may in certain circumstances be made to support possessory rights, long and quietly enjoyed, where no actual proof of title is forthcoming but that presumption cannot be made where there is sufficient evidence and convincing proof of the nature

of the grant and the persons to whom it was made. *Satyanarayana* v. *Venkatapayya*,

AIR 1953 SC 195=1953 SCJ 283.

(945) *Lost grant— Doctrine of — Lost grant in favour of fluctuating and unascertained body of persons — Right to remain in possession of fishery on basis of lost grant claimed by fisherman of village —T.P. Act (1882), S. 105—Easements Act (1882), Ss. 15, 17 — Riparian rights, fishery.*

The doctrine of lost grant has no application to the case of inhabitants of particular localities seeking to establish rights of user to some piece of land or water. A I R (37) 1950 P C 56, *Rel. on.*

No lost grant can be presumed in favour of a fluctuating and unascertained body of persons who constitute the inhabitants of a village and such a right could only be acquired by custom: A I R (24) 1937 Cal 245, *Approved*

A right to fish from the fishery based on mere inhabitancy is capable of an increase almost indefinite and if the right exists in a body which might increase in number, it would necessarily lead to the destruction of the subject-matter of the grant. Moreover, there could not be a valid grant to a body so incapable of succession in any reasonable sense of the word, so as to confer a right upon each succeeding inhabitant.

Being fishermen by profession has not the effect of incorporating them. *Braja Sunder Deb* v. *Moni Behara*,

AIR 1951 S C 247=1951 S C J 363 =1951 S C R 431.

HINDU LAW

(946) *Adoption — Relation back — Divesting of estate inherited from collateral.*

The ground on which an adopted son is held entitled to take in defeasance of the rights acquired prior to his adoption is that in the eye of law his adoption relates back, by a legal fiction, to the date of the death of his adoptive father, he being put in a position of a posthumous son. The scope of the principle of relation back is clear. It applies only when the claim made by the adopted son relates to the estate of his adoptive father. This estate may be definite and ascertained as when he is the sole and absolute owner of the properties, or it may be fluctuating as when he is a member of a joint Hindu family, in which the interest of the coparceners is liable to increase by death or decrease by brith. In either case, it is

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the interest of the adoptive father which the adopted son is declared entitled to take as on the date of his death. The theory on which this doctrine is based is that there should be no hiatus in the continuity of the line of the adoptive father. That, by its very nature, can apply only to him and not to his collaterals.

In deciding that an adopted son is entitled to divest the estate of a collateral, which had devolved by inheritance prior to his adoption, '*Anant Bhikappa* v. *Shankar Ramchandra*, A I R 1943 P C 196, went far beyond what had been previously understood to be the law. It is not in consonance with the principle well established in Indian jurisprudence that an inheritance could not be in abeyance, and that the relation back of the right of an adopted son is only quoad the estate of the adoptive father.

Moreover, the law as laid down therein leads to results which are highly inconvenient. When an adoption is made by a widow of either a coparcener or a separated member, then the right of the adopted son to claim properties as on the date of the death of the adoptive father by reason of the theory of relation back is subject to the limitation that alienations made prior to the date of adoption are binding on him, if they were for purposes binding on the estate.

Thus, transferees from limited owners, whether they be widows or coparceners in a joint family, are amply protected. But no such safeguard exists in respect of property inherited from a collateral because if the adopted son is entitled on the theory of relation back to divest that property, the position of the mesne holder would be that of an owner possessing a title defeasible on adoption, and the result of such adoption must be to extinguish that title and that of all persons claiming under him. The alienees from him would have no protection, as there could be no question of supporting the alienations on the ground of necessity or benefit. And if the adoption takes place long after the succession to the collateral had opened and the property might have meanwhile changed hands several times, the title of the purchasers would be liable to be disturbed quite a long time after the alienation. The Courts must hesitate to subscribe to a view of the law which leads to consequences so inconvenient.

The decision in '*Anant Bhikappa* v. *Shankar Ramachandra*, AIR 1943 PC 196,

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in so far as it relates to properties inherited from collaterals is not therefore sound, and in respect of such properties the adopted son can lay no claim on the ground of relation back. The view in A I R 1943 P C 196, examined and held not sound. Case law reviewed. *Sirinivas* v. *Narain*,

AIR 1954 S C 379
=1954 S C J 408.

(947) Adoption—Civil P. C. (1908), S. 11 — Litigating under the same title—Compromise decree and estoppel — (Evidence Act (1872), S. 115)

See Sundarabai v. *Devaji Shanker Deshpande*, A I R 1954 S C 82 under C. P. C. Section 11.

(948) *Alienation—Shebait—Legal necessity—Proof of—Recitals in old document—Legal necessity—Presumption of.*

It is well settled that if all the original parties to the transfer by a shebait & those who could have given evidence on the relevant points such as legal necessity have passed away a recital consisting of the principal circumstances of the case assumes greater importance & cannot be lightly set aside.

It is now well settled that where the validity of a permanent lease granted by a shebait is called into question a long time after the grant, although it is not possible to ascertain fully what the circumstances were in which it was made, the Court should assume that the grant was made for necessity so as to be valid beyond the life of the grantor.

Held that the circumstances which could be gathered from the recital together with the fact that document had remained unquestioned for more than half a century, were quite sufficient to support the conclusion that the grant of a permanent lease was made for legal necessity & was binding on the deity. A I R 1922 P C 163, *Rel. on. Iswar Gopal* v. *Pratap Mal Bagaria*,

AIR 1951 S C 214=1951 S C J 285
=1951 S C R 332.

(949) *Ascetic—Effect.*

The entrance into a religious order generally operates as a civil death. The man who becomes an ascetic severs his connection with the members of his natural family and being adopted by his preceptor becomes, so to say, a spiritual son of the latter. The other disciples of his guru are regarded as his brothers, while the co-disciples of his Guru are looked upon as uncles and in this

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way a spiritual family is established on the analogy of a natural family. *Sital Das* v. *Sant Ram*, AIR 1954 S C 606.

(950) *Ascetic—Ceremonies.*

An entry into a religious order is accompanied by certain rites and ceremonies. *Sital Das* v. *Sant Ram*,

AIR 1954 S C 606.

(951) *Impartible estate— Alienation— Power to alienate.*

The person in whom the inheritance to impartible estate vests is competent to alienate a part of it. *Chinnathayi* v. *Kulasekara.*

A I R 1952 S C 29
=1952 S C R 241
=1952 S C J 1.

(952) *Impartible — Separation — Proof of.*

To establish that an impartible estate has ceased to be joint family property for purposes of succession it is necessary to prove an intention, express or implied, on the part of the junior members of the family to give up their chance of succeeding to the estate. In each case, it is incumbent on the plaintiff to adduce satisfactory grounds for holding that the joint ownership of the defendant's branch in the estate was determined so that it became the separate property of the last holder's branch. The test to be applied is whether the facts show a clear intention to renounce or surrender any interest in the impartible estate or a relinquishment of the right of succession and an intention to impress upon the zamindari the character of separate property. A. I. R. (15) 1928 P. C. 68; A. I. R. (21) 1934 P. C. 157 and 20 Mad. 256 (P. C.), *Rel. on.*

Held, that the evidence in the case was trivial and inconclusive and from the documents no intention could be deduced on the part of the junior members or on the part of any other member of the family of disrupting and dividing the family and renouncing their expentancy of succession. On the other hand, the statements made by the members of the family clearly indicated that none of them had any intention of giving up his rights of heirship to the zamindari *Chinnathayi* v. *Kulasekara.*

A I R 1952 S C 29
=1952 S C R 241
=1952 S C J 1.

(953) *Impartible estate— Separation— Right to alienate does not imply right to partition estate.*

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The right to bring about a partition of an impartible estate cannot be inferred from the power of alienation that the holder thereof may possess. In the case of an impartible estate the power to divide it amongst the members does not exist, though the power in the holder to alienate it is there and from the existence of one power the other cannot be deduced, as it is destructive of the very nature and character of the estate and makes it partible property capable of partition. *Chinnathayi* v. *Kulasekara.*

A I R 1952 SC 29
=1952 S C R 241
=1952 S C J 1.

(954) *Impartible estate—Separation — Question of fact—(Civil P. C. (1908), Ss. 100-101).*

The question whether there was separation among the members of the family owning an impartible zamindari is primarily a question of fact and the Courts below having held that it is not proved, the finding cannot be disturbed in appeal unless there are valid grounds. *Chinnathayi* v. *Kulasekara.*

A I R 1952 S C 29
=1952 S C R 241
=1952 S C J 1.

(955) *Impartible estate— Succession— Release of right to succeed—When operative.*

There can be no doubt that a member of a joint family owning an impartible estate can on behalf of himself and his heirs renounce his right of succession; but any such relinquishment must operate for the benefit of all the members and the surrender must be in favour of all the branches of the family or in favour of the head of the family as representing all its members.

Held, that the document in question could not operate as a valid relinquishment as it did not evidence an intention on the part of the member to surrender the right of succession of his branch and was not executed in favour of the head of the family or in favour of all the members of the family *Chinnathayi* v. *Kulasekara.*

A I R 1952 S C 29
=1952 S C R 241
=1952 S C J 1.

(956) *Impartible estate — Succession— Deed of release of right to succeed—Construction—General words—Effect — (Deed —Construction).*

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It is well settled that general words of a release do not mean release of rights other than those then put up and have to be limited to the circumstances which were in the contemplation of the parties when it was executed. 4 H. L. 610, *Foll.*; 1 Cal. 153 (P.C.), *Rel. on. Chinnathayi* v. *Kulasekara.*

A I R 1952 SC 29
=1952 S C R 241
=1952 S C J 1.

(957) *Joint family—Debts—Father — Personal debt by father, who was a junior member of coparcenary—Sons are liable, when debt is not immoral—Father's undivided share including the shares of his sons can be sold—Sons—Sons need not be parties—Partition suit by execution purchaser—Sons' right to challenge their liability on ground of immorality of debt.*

The question whether the sons of the judgment-debtor who was a junior member of coparcenary are liable in law to discharge the decretal debt due by their father can be answered only with reference to the doctrine of Mitakshara law which imposes a duty upon the descendants of a person to pay the debts of their ancestor provided they are not tainted with immorality. (The origin and the purpose of the doctrine pointed out).

Under the law, as it now stands, the obligation of the sons is not a personal obligation existing irrespective of the receipt of any assets; it is a liability confined to the assets received by him as his share of the joint family property or to his interest in the same. The obligation exists whether the sons are major or minor or whether the father is alive or dead. If the debts have been contracted by the father and they are not immoral or irreligious, the interest of the sons in the coparcenary property can always be made liable for such debts.

There is no warrant for the view that to saddle sons with this pious obligation to pay the debts of their father, it is necessary that the father should be the manager or karta of the joint family, or that the family must be composed of the father and his sons only and no other male member. No such limitation is deducible either from the original texts or the principles which have been engrafted upon the doctrine by the judicial decisions.

The authority of the manager to incur a debt binding on family is based upon the

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principle of agency or implied authority. Family debt contracted by the manager for necessity or benefit of the family, however, stands on quite a different footing from a personal debt contracted by the father which does not benefit the family. The liability of his sons to pay such debt does not rest on the principle indicated above according to which the junior members of a family are made to pay the family debts. It is special liability created on purely religious grounds and can be enforced only against the sons of the father and no other coparcener. The liability, therefore, has its basis entirely on the relationship between the father and the son. It is in no way dependent upon the constitution of the family either at the time when the debt was contracted or when the obligation is sought to be enforced.

It cannot be laid down as a proposition of law that the creditor's power of proceeding against the son's share in the joint estate for recovery of the debt due by the father is co-extensive with the father's power of disposal over such interest. If the creditor's rights are deemed to be based exclusively upon the father's power of disposition over the son's interest, such rights must necessarily come to an end as soon as the father dies, or there is a partition between him and his sons. It is settled law that even after partition the sons could be made liable for the pre-partition debts at the time when the partition was effected, although the father could have no longer any right of alienation in regard to separated shares of the sons.

Though under the Mitakshara law, as it is administered in the State of Bihar, no coparcener, can alienate, even for valuable consideration, his undivided interest in the joint property without the consent of his coparceners, it is open to the creditor, who has obtained a decree against him personally to attach and put up to sale this undivided interest, and after purchase to have the interest separated by a suit for partition.

A personal decree obtained against the sons can certainly be executed against them by attachment and sale of their un-divided interest. The position cannot be different if they are under a legal liability to discharge the decretal debt due by their father and this liability must be capable of being enforced in the same manner as a personal decree against them. Whether this can be

done only making the sons parties to the sale or execution proceeding, is another matter but so far as the legal liability of the sons is concerned, where the debts incurred by the father have not been shown to be immoral or irreligious, it must be held that under the rule of Hindu law mentioned above, there is a legal liability on the part of the sons to discharge these debts and the creditor can enforce this liability by attachment and sale of the son's interest in the same manner as if it was a personal debt due by them. The fact that the father was not the karta or manager of the joint family or that the family did consist of other coparceners besides the father and sons, does not affect the liability of the sons in any way.

Strictly speaking, the sons cannot be said to be necessary parties to the money suit which is instituted by the creditor against the father on the basis of a promissory note executed by him. If a decree is passed against the father and the sons jointly, the latter would be personally liable for the debt and the decree can be executed against their separate or personal property as well.

A money decree, passed against the father certainly creates a debt payable by him. If the debt was not tainted with immorality, it is open to the creditor to realise the dues by attachment and sale of the sons' coparcenary interest in the joint property. The creditor has an option in such cases. He can, if he likes, proceed against the father's interest alone but he can, if he so chooses, put up to sale the sons' interest also and, it is a question of fact to be determined with reference to the circumstances of each individual case whether the smaller, or the larger interest was actually sold in execution. Where it has been found as a fact that the executing court intended to sell and did sell a four anna share in the joint property which included the undivided interest of the sons, all that the son can claim in such cases is that not being made party to the sale or execution proceeding, he ought not to be barred from trying the nature of the debt or his liability to pay the same in any suit or proceeding started by him or to which he might be made a party. He can raise the point either by way of objection in the execution proceeding itself or he can himself file a suit for a declaration that the debt was not binding on him. He can also raise it by way of defence when the auction

purchaser seeks to have his right defined and demarcated in a partition suit. A I R 1949 Pat 309, *Reversed*, 13 Cal 21 (P C), *Expln.* and *Rel. on.*; 25 Mad 149, *Approved.* *Sidheswar* v. *Bhubneshwar*,

A I R 1953 S C 487
=1954 S C R 177=1953 S C J 700.

(958) *Joint family—Debts — Decree—Sale in execution of undivided share of debtor in property—Rights of auction purchaser.*

Decree for personal debt against a coparcener — Execution sale — Purchase of undivided interest of coparcener including his sons' interest — Purchaser held did not acquire title to any defined share in property and was not entitled to joint possession from date of his purchase — He could work out his rights only by a suit for partition and his right to possession would date from the period when a specific allotment was made in his favour. Purchaser's right to profits would date from the date of partition. AIR 1949 Pat 309, *Affirmed.* *Sidheswar* v. *Bhubneshwar*,

A I R 1953 S C 487
=1954 S C R 177—1953 S C J 700.

(959) *Joint family property—Self acquisition — Burden of proof.*

While it is not unusual for a family to hold properties for generations without a title deed, an acquisition by a member would ordinarily be evidenced by a deed. When therefore, a property is found to have been in the possession of a family from time immemorial, it is not unreasonable to presume that it is ancestral and to throw the burden on the party pleading self-acquisition to establish it. *Sirinivas* v. *Narain*, **A I R 1954 S C 380=1954 S C J 408.**

(960) *Joint family—Self-acquisition — Existence of joint family property—Burden of proof.*

Proof of the existence of a joint family does not lead to the presumption that property held by any member of the family is joint and the burden rests upon anyone asserting that any item of property was joint to establish the fact. But where it is established that the family possessed some joint property which from its nature and relative value may have formed the nucleus from which the property in question may have been acquired, the burden shifts to the party alleging self-acquisition to establish affirmatively that the property was acquired

without the aid of the joint family property. A I R 1947 P C 189 (192), *Rel. on.*

Whether the evidence adduced by the plaintiff was sufficient to shift the burden which initially rested on him of establishing that there was adequate nucleus out of which the acquisitions could have been made is one of fact depending on the nature and the extent of the nucleus. The important thing to consider is the income which the nucleus yields. A building in the occupation of the members of a family and yielding no income could not be a nucleus out of which acquisitions could be made, even though it might be of considerable value. On the other hand, a running business in which the capital invested is comparatively small might conceivably produce substantial income, which may well form the foundation of the subsequent acquisitions. These are not abstract questions of law, but questions of fact to be determined on the evidence in the case.

Where the finding of the Courts is that the income from the ancestral lands was not sufficient even for the maintenance of the members and the houses in dispute are substantial, burden is on the plaintiff who alleges the houses to have been acquired out of joint family funds to establish it.

Held that even if the contention that on proof of the existence of the watan lands the burden had shifted on to the defendants to prove that the acquisitions were made without the aid of joint family funds, that burden had been discharged.

Likewise it was held that since the ancestral Watan lands were intact, and were available for partition, and small income derived from them must have been utilised for the maintenance of the members of the family, whether it were held that the plaintiff had failed to discharge the burden which lay on him of establishing sufficient nucleus, or that the defendants had discharged the burden of establishing that the acquisitions were made without the aid of joint family funds, the result was the same. A I R 1947 P C 189, *Rel. on. Sirinivas* v. *Narain*,
A I R 1954 S C 380=1954 S C J 408.

(961) *Maintenance —Illegitimate son— Nature of right.*

Under the Mitakshara law, an illegitimate son is entitled to maintenance as long as he lives, in recognition of his status as a member of his father's family and by reason

of his exclusion from inheritance among the regenerate classes.

The illegitimate son does not claim maintenance merely as a compassionate allowance. 17 Mad 160, Rel. on; 27 Mad 32, Ref. *A. R. Raja Kumar* v. *Narayana Rao*,
A I R 1953 S C 433.

(962) *Maintenance — Illegitimate son —Rate of maintenance — Factors to be considered in fixing rate.*

Fact that father during his life-time had spent considerable sums in trying to set him up in life is not relevant — Determination of exact amount of income from properties belonging to father, is the principal factor to be considered in fixing rate of maintenance to be paid to son — Fact that since judgment of trial Court was delivered, father died with the result that entire income of properties was being enjoyed by his only son, instead of its being enjoyed by him and his father, is hardly a relevant consideration for High Court for increasing amount fixed by trial Court. *A. R. Raja Kumar* v. *Narayana Rao*,
A I R 1953 S C 433.

(963) *Mitakshara father — Rights of disposing of immovable property.*

A Mitakashara father is not only competent to sell his self-acquired immovable property to a stranger without the concurrence of his sons but he can make a gift of such property to one of his own sons to the detriment of another and he can make even an unequal distribution amongst his heirs. 20 All 267 (PC), *Rel. on.*; 6 WR. 71; 1 All 394, *Ref. Arunachala* v. *Muruganatha Mudaliar*, **A I R 1953 S C 495 =1953 S C J 707=1954 S C R 243.**

(964) *Mitakshara School—Ancestral property—Right of son by birth.*

According to Mitakshara, the son has a right by birth in his father's and grandfather's estate, but a distinction is made in this respect by Mitakshara itself. In the ancestral or grandfather's property in the hands of the father, the son has equal rights with his father; while in the self-acquired property of the father, his rights are unequal by reason of the father having an independent power over or predominant interest in the same. *Arunachala* v. *Muruganatha*, **A I R 1953 S C 495 =1953 S C J 707=1954 S C R 243.**

(965) *Mitakshara School — Ancestral property—Son when can assert equal right with his father.*

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The son can assert an equal right with the father only when the grandfather's property has devolved upon his father and has become ancestral property in his hands. The property of the grandfather can normally vest in the father as ancestral property if and when the father inherits such property on the death of the grandfather or receives it, by partition, made by the grandfather himself during his life-time. On both these occasions, the grandfather's property comes to the father by virtue of the latter's legal right as a son or descendant of the former and consequently it becomes ancestral property in his hands. *Arunachala* v. *Muruganatha*,

A I R 1953 S C 495 =1953 S C J 707=1954 S C R 243.

(966) *Mitakshara School —Gift or will —Property got under will of or gift by father — Property in the hands of legatee or donee is not ancestral 'ipso facto'.*

In view of the settled law that a Mitakshara father has absolute right of disposition over his self-acquired property to which no exception can be taken by his male descendants, it is not possible to hold that such property bequeathed or gifted to a son must necessarily, and under all circumstances, rank as ancestral property in the hands of the donee in which his sons would acquire co-ordinate interest.

To find out whether a property is or is not ancestral in the hands of a particular person, not merely the relationship between the original and the present holder but the mode of transmission also must be looked to; and the property can ordinarily be reckoned as ancestral only if the present holder has got it by virtue of his being a son or descendant of the original owner. But when the father obtains the grandfather's property by way of gift, he receives it not because he is a son or has any legal right to such property but because his father chose to bestow a favour on him which he could have bestowed on any other person as well. The interest which he takes in such property must depend upon the will of the grantor.

There is no warrant for saying that according to the Mitakshara, an affectionate gift by the father to the son constitutes 'ipso facto' ancestral property in the hands of the donee. In other words, a property gifted or bequeathed by a father to his son cannot become ancestral property in the

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hands of the donee or legatee simply by reason of the fact that the donee or legatee got it from his father or ancestor.

As the law is accepted and well settled that a Mitakshara father has complete powers of disposition over his self-acquired property, it must follow as a necessary consequence that the father is quite competent to provide expressly, when he makes a gift, either that the donee would take it exclusively for himself or that the gift would be for the benefit of his branch of the family. If there are express provisions to that effect either in the deed of gift or a will, no difficulty is likely to arise and the interest which the son would take in such property would depend upon the terms of the grant. If, however, there are no clear words describing the kind of interest which the donee is to take, the question would be one of construction and the Court would have to collect the intention of the donor from the language of the document taken along with the surrounding circumstances in accordance with the well-known canons of construction. 6 W R 71 (Cal.), *Overruled*: 21 Mad 429; AIR 1944 Pat 298 (FB), **Not approved**, 10 Bom 528; 29 All 354 and A I R 1918 Lah 394, **Approved**; A I R 1923 P C 160, **Ref.**

(In this case it was held on reading the will as a whole that the testator intended the legatees to take the properties in absolute right as their own self-acquisition without being fettered in any way by the rights of their sons and grandsons. In other words, he did not intend that the property should be taken by the sons as ancestral property). *Arunachala* v. *Muruganatha*,

A I R 1953 SC 495 =1953 S C J 707=1954 S C R 243.

(967) *Partition—Evidence as to separation — Statements of deceased member— Admissibility — Evidence Act (1872), S. 32 (3).*

The statements of a particular person that he is separated from a joint family of which he was a coparcener, and that he has no further interest in the joint property or claim to any assets left by his father, would be statements made against the interest of such person, and, after such person is dead they would be relevant under S. 32 (3), Evidence Act. The assertion that there was separation not only in respect of himself but between all the coparceners would be admissible as a connected matter and an integral

part of the same statement. It is not merely the precise fact which is against interest that is admissible but all matters that are involved in it and knit up with the statement. *Bhagwati Prasad* v. *Rameshwari Kuer*,

A I R 1952 S C 72 = 1951 S C R 603=1952 S C J 115.

(968) *Partition — Separation of one co-parcener — Status of remaining co-parceners — Burden of proof.*

The general principle undoubtedly is that a Hindu family is presumed to be joint unless the contrary is proved but where one of the coparceners separates himself from the other members of the joint family and has his share in the joint property partitioned off for him, there is no presumption that the rest of the coparceners continued to be joint. It would be a question of fact to be determined in each case upon the evidence relating to the intention of the parties whether there was a separation amongst the other coparceners or that they remained united. The burden would undoubtedly lie on the party who asserts the existence of a particular state of things on the basis of which he claims relief. A. I. R. 1931 P. C. 154, A. I. R. 1925 P. C. 49 and 30 Cal. 725 (P. C.), *Ref. Bhagwati Prasad* v. *Rameshwari Kuer*,

A I R 1952 S C 72 = 1951 S C R 603=1952 S C J 115.

(969) *Partition—Separation of members — Subsequent joint residence or acting jointly for business — Effect.*

Except in the case of reunion, the mere fact that separated coparceners choose to live together or act jointly for purposes of business or trade or in their dealings with properties, would not give them the status of coparceners under the Mitakshara law. *Bhagwati Prasad* v. *Rameshwari Kuer*,

A I R 1952 S C 72 = 1951 S C R 603 = 1952 S C J 115.

(970) Partition — Two brothers living in separate houses and being separate in mess — Produce divided between them half and half — Held though there was no partition by metes and bounds, the two brothers were divided in status. *Gur Narain Das* v. *Gur Tahal Das*,

A I R 1952 S C 225 = 1952 S C R 869=1952 S C J 305.

(971) *Partition — Suit for — Maintainability.*

Where the plaintiff is a co-sharer in the properties he can maintain a suit for partition even though he is not in actual possession unless exclusion and ouster are pleaded and proved. *Gur Narain Das* v. *Gur Tahal Das*,

A I R 1952 S C 225 = 1952 S C R 869=1952 S C J 305.

(972) *Partition — Sudras—Illegitimate son.*

The illegitimate son of a Sudra by a continuous concubine has the status of a son, and he is a member of the family; the share of inheritance given to him is not merely in lieu of maintenance, but in recognition of his status as a son. Where the father has left no separate property and no legitimate son, but was joint with his collaterals, the illegitimate son is not entitled to demand a partition of the joint family property in their hands, but is entitled as a member of the family to maintenance out of that property. The illegitimate son does not acquire by birth any interest in his father's estate and he cannot therefore demand partition against his father during the latter's life-time. On his father's death the illegitimate son succeeds as a coparcener to the separate estate of the father along with the legitimate sons with a right of survivorship and is entitled to enforce partition against the legitimate sons, and on a partition between a legitimate and an illegitimate son, the illegitimate son takes only one-half of what he would have taken if he was a legitimate son. A. I. R. 1931 P. C. 294, *Rel. on. Gur Narain Das* v. *Gur Tahal Das*,

A I R 1952 S C 225 = 1952 S C R 869 = 1952 S C J 305.

(973) *Partition — Liability of son for prepartition debts of father — Civil P. C. (1908), Ss. 47 and 53.*

The son is not personally liable for the debt of his father even if the debt was not incurred for an immoral purpose and the obligation is limited to the assets received by him in his share of the joint family property or to his interest in such property and it does not attach to his self-acquisition. The duty being religious or moral, it ceases to exist if the debt is tainted with immorality or vice. The pious liability of the son to pay the debts of his father exists whether the father is alive or dead. Thus, it is open to the father, during his lifetime, to effect a transfer of any joint family property including the interests of his sons in the same to pay off an antecedent debt not incurred for

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family necessity or benefit, provided it is not tainted with immorality. It is equally open to the creditor to obtain a decree against the father and in execution of the same put up to sale not merely the father's but also the son's interest in the joint estate. The creditor can make the sons parties to such suit and obtain an adjudication from the Court that the debt was a proper debt payable by the sons. But even if the sons are not made parties, they cannot resist the sale unless they succeed in establishing that the debts were contracted for immoral purposes. As regards debts contracted by the father after partition, the sons are not liable for such debts. The share which the father receives on partition and which after his death comes to his sons, may certainly, at the hands of the latter, be available to the creditors of the father, but the shares allotted on partition to the sons can never be made liable for the post-partition debts of the father. The sons are liable to pay the pre-partition debts of the father even after partition unless there was an arrangement for payment of these debts, at the time when the partition took place. An arrangement for payment of debts does not necessarily imply that a separate fund should be set apart for payment of these debts before the net assets are divided, or that some additional property must be given to the father over and above his legitimate share sufficient to meet the demands of his creditors. Whether there is a proper arrangement for payment of the debts or not, would have to be decided on the facts and circumstances of each individual case. If the arrangement made at the time of partition is reasonable and proper, an unsecured creditor cannot have any reason to complain. The fact that he is no party to such arrangement is immaterial. Of course, if the transaction is fraudulent or is not meant to be operative, it could be ignored or set aside; but otherwise it is the duty of unsecured creditor to be on his guard lest any family property over which he has no charge or lien is diminished for purposes of realization of his dues. A decree against the father alone obtained after partition in respect of such debt cannot be executed against the property that is allotted to the son on partition. A separate and independent suit must be instituted against the sons before their shares can be reached. The provision of S. 53, Civil P. C. cannot be extended to a case

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when the father is still alive. The position however, would be materially different if the sons are made parties to the suit as legal representatives of their father and a decree is passed against them limited to the assets of the deceased defendant in their hands. A proceeding for execution of such a decree would attract the operation of S. 47, Civil P. C. Section 53 has been worded in such a comprehensive manner that it is wide enough to include all cases where a son is in possession of ancestral property which is liable under the Hindu Law to pay the debts of his father; and either the decree has been made against the son as legal representative of the father or the original decree being against the father, it is put into execution against the son as his legal representative under S. 50, Civil P. C. In both these sets of circumstances, the son is deemed by a fiction of law to be the legal representative of the deceased debtor in respect of the property which is in his hands and which is liable under the Hindu Law to pay the debts of the father, although as a matter of fact he obtained the property not as a legal representative of the father at all. If the son is bound under Hindu Law to pay the father's debts from any ancestral property in his hands, the remedy of the decree-holder against such property lies in the execution proceedings and not by way of a separate suit. The son would certainly be at liberty to show that the property in his hands is for certain reasons not liable to pay the debt of his father and all these questions would have to be decided by the executing Court under S. 47, Civil P. C.: 22 Mad 519 : 9 Mad L J 127; 41 Mad 136 : A I R 1919 Mad 1175, *Overruled.* Minority view in A I R 1935 Pat 275 (FB), *Approved. Panna Lal* v. *Mst. Naraini*,

A I R 1952 S C 170
=1952 S C R 544=1952 S C J 211.

(974) *Partition — Compromise effecting partition — Right of minor coparceners to set aside — Grounds for — Civil P. C. (1908), O. 32, R. 7.*

A minor can sue for partition and obtain a decree if his next friend can show that it is for the minor's benefit. So, also, an adult coparcener can enforce a partition by suit even when there are minors. Even without a suit, there can be a partition between members of a joint family when one of the members is a minor. In the case of such lastly mentioned partitions, where a minor

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can never be able to consent to the same in law, if a minor on attaining majority is able to show that the division was unfair and unjust, the Court will set it aside. The rule however, does not apply to decrees if the minor is properly represented before the Court and the decree is as binding on him as on the adult parties, unless the minor can show fraud or negligence on the part of his next friend or guardian ad litem. 30 Cal 738 P C, *Ref. Bishundeo* v. *Seogeni Rai*, **A I R 1951 S C 280 =1951 S C R 548=1951 S C J 413.**

(975) *Religious endowment—Conception of Mahantship — Rights of Mahant.*

In the conception of Mahantship, as in Shebaitship, both the elements of office and property, of duties and personal interest are blended together and neither can be detached from the other. The personal or beneficial interest of the Mahant in the endowments attached to an institution is manifested in his large powers of disposal and administration and his right to create derivative tenures in respect to endowed properties; and these and other rights of a similar character invest the office of the Mahant with the character of proprietary right which, though anomalous to some extent, is still a genuine legal right. However, the Mahantship is not heritable like ordinary property. A I R 1922 P C 123; A I R 1936 P C 318; A I R 1943 P C 89; A I R 1951 S C 293, *Foll. Commr. H. R. E.* v. *L. T. Swamiar*, **A I R 1954 S C 282 =1954 S C J 335.**

(976) *Religious Endowment — Public temple or religious institution — Right of entry in.*

It is well known that there can be no such thing as an unregulated and unrestricted right of entry in a public temple or other religious institution, for persons who are not connected with the spiritual functions thereof. It is a traditional custom universally observed not to allow access to any outsider to the particularly sacred parts of a temple, as for example, the place where the deity is located. There are also fixed hours of worship and rest for the idol when no disturbance by any member of the public is allowed. *Commr. H. R. E.* v *L. T. Swamiar*, **A I R 1954 S C 282 =1954 S C J 335.**

(977) *Religious endowment — Math — Surplus income of Math—Power of disposal of Mahant.*

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The Mahant has large powers of disposal over the surplus income of a Math of which he is the Mathadhipati and the only restriction is that he cannot spend anything out of it for his personal use unconnected with the dignity of his office. *Commr., H. R. E.* v. *L. T. Swamiar*, **A I R 1954 S C 282 =1954 S C J 335.**

(978) *Religious Endowments — Public Temple—Right of entrance into temple for purpose of worship or darshan — Nature and extent of — Deoprayagi pandas of Badrinath — Right of, to enter Badrinath Temple along with their Yajmans and to take gifts—Declaratory suit—Civil P. C. (1908) S. 9 — U. P. Sri Badrinarain Temple Act, (XVI [16] of 1939), S. 25.*

The Temple of Shri Badrinath being admittedly a public place of worship of the Hindus, the right of entrance into the temple for purposes of 'Darshan' or worship is a right which flows from the nature of the institution itself, and for the acquisition of such rights, no custom or immemorial usage need be asserted or proved. As the Panda as well as his client are both Hindu worshippers, there can be nothing wrong in the one's accompanying the other inside the temple and the fact that the pilgrim, being a stranger to the spot takes the assistance of the Panda in the matter of 'Darshan' or worship of the deities or that the Panda gets remuneration from his client for the services he renders, does not in any way affect the legal rights of either of them. In law, it makes no difference whether one performs the act of worship himself or is aided or guided by another in the performance of it. If the Pandas claim any special right which is not enjoyed ordinarily by members of the Hindu public, they would undoubtedly have to establish such right on the basis of custom, usage or otherwise.

This right of entry into a public temple is, however, not an unregulated or unrestricted right. It is open to the trustees to fix certain hours of the day during which alone members of the public would be allowed access to the shrine. The public may also be denied access to certain particularly sacred parts of the temple, e.g., the inner sanctuary or as it is said the 'Holi of Holies' where the deity is actually located. Quite apart from these, it is always competent to the temple authorities to make and

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enforce rules to ensure good order and deceny of worship and prevent over-crowding in a temple. Good conduct or orderly behaviour is always an obligatory condition of admission into a temple and this principle has been accepted by and recognised in the Shri Badrinath Temple Act, section 25 of which provides for framing of bye-laws by the temple committee *inter alia* for maintenance of order inside the temple and regulating the entry of persons within it :

Held, that the right of the plaintiffs who were Deoprayagi Pandas of Badrinath, of entering Shri Badrinath Temple along with their Yajmanas was not a precarious or a permissive right depending for its existence upon the arbitrary discretion of the temple authorities; it was a legal right in the true sense of the expression, but it could be exercised subject to the restrictions which the temple committee might impose in good faith for maintenance of order and decorum within the temple and for ensuring proper performance of customary worship. The plaintiffs were, therefore, entitled to a declaration in this form :

Held further, that the plaintiffs were not entitled to a declaration that they had a right to take within the precincts of the temple whatever is put into their hands as gifts by their clients at the time of worship.

The gift, if any, which a pilgrim might choose to make within the temple precincts is entirely a voluntary act on his part and as he could not be compelled to make a gift either in favour of the Pandas or anybody else, there could, strictly speaking, be no legal right in the plaintiffs to receive any gift from his client which can be declared by a Court of law. *Nar Hari* v. *Badri Nath Temple Committee*,

A I R 1952 S C 245
=1952 S C R 840=1952 S C J 310.

(979) *Religious endowments — Shebaitship.*

Whatever might be said about the office of a trustee, which carries no beneficial interest with it, a shebaitship, combines in it both the elements of office and property. As the shebaiti interest is heritable and follows the line of inheritance from the founder, obviously, when the heir is a female, she must be deemed to have, what is known, as widow's estate in the shebaiti interest.

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It is quite true that regarding the powers of alienation a female shebait is restricted in the same manner as the male shebait, but that is because there are certain limitations and restrictions attached to and inherent in the shebaiti right itself which exist irrespective of the fact whether the shebaitship vests in a male or a female heir. A I R 1951 S C 293, *Rel. on.*; 28 Mad 197 and 6 C L J 621, *Ref. Kalipada* v. *Palani Bala*, **A I R 1953 S C 125**
=1953 S C R 503=1953 S C J 208.

(980) *Religious endowment—"Religious purpose" how determined.*

In considering the validity of a dedication of property for religious purpose, what is a religious purpose under the Hindu Law must be determined according to Hindu notions. Under the Hindu law, religious or charitable purposes are not confined to purposes which are productive of actual or assumed public benefit. The acquisition or religious merit is also an important criterion. 6 Bom 42; 4 Cal 443 and 9 Bom 169, *Rel. on.*

So far as the textual Hindu law is concerned, what acts conduce to religious merit and justify a perpetual dedication of property therefor is fairly definite. What conduces to religious merit in Hindu law is primarily a matter of shastraic injunction. To the extent, therefore, that any purpose is claimed to be a valid one for perpetual dedication on the ground of religious merit though lacking in public benefit, it must be shown to have a shastraic basis so far as Hindus are concerned.

Additional religious practices and beliefs may have grown up and obtained recognition from certain classes, as constituting purposes conducive to religious merit. If such beliefs are to be accepted by Courts as being sufficient for valid perpetual dedication of property therefore, without the element of actual or presumed public benefit, it must at least be shown that they have obtained wide recognition and constitute the religious practice of a substantial and large class of persons. But it cannot be maintained that the belief in this behalf of one or more individuals is sufficient to enable them to make a valid settlement permanently tying up property. The heads of religious purposes determined by belief in acquisition of religious merit cannot be allowed to be widely enlarged consistently

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with public policy and needs of modern society. 30 Mad 340, *Ref. Saraswathi Ammal* v. *Rajagopal Ammal*,

A I R 1953 S C 491
=1954 S C R 277=1953 S C J 714.

(981) *Religious endowment—Perpetual settlement of property for worship of tomb is invalid.*

Where, notwithstanding that the major portion of the income may have to be spent for Gurupooja and annadhanam in connection with the annual sradh, it is clear from a settlement deed that the dominant purpose of the dedication of property was the samadhi kainkariyam, that is to say, the worship of and at the samadhi (tomb), the settlement deed is invalid. The reason is that perpetual dedication of property for worship at a tomb is not valid amongst Hindus: A I R 1935 Mad 29; A I R 1945 Mad 217; A I R 1946 Mad 485, *Approved*: 15 Mad 424, *Criticised*: A I R 1939 Mad 134, *Expl.*; 34 Mad 12, *Disting. Saraswathi Ammal* v. *Rajagopal Ammal*,

A I R 1953 S C 491
=1954 S C R 277=1953 S C J 714.

(982) *Religious Endoument—Succession—Thakurdwar of Ram Kabir sect Mouza Jamshed in Jullunder District (A. I. R. 1952 Punjab 301,* REVERSED*).*

Succession to Mahantship of a math or religious institution is regulated by custom or usage of the particular institution, except where a rule of succession is laid down by the founder himself who created the endowment: 13 Ind App 100 (105) (P C), *Rel. on.*

The custom that is proved to exist in the Bairagi institution, in matters of succession to mahantship, of a Thakurdwara belonging to the Ram Kabir Sect of Hindu Bairagis situated at Mouza Jamsher in District Jullunder is that the Bhek of the Bairagis and the worshippers of the temple together appoint the successor, but the appointment has got to be made from the disciples of the deceased Mahant, if he has left any, and failing disciples, any one of his spiritual kindred like a Gurubhai, Bhatija chela or a Pota chela could be appointed. If a disciple of the Mahant exist he has the first right to be appointed, except in case of proved disability; but it would not be correct to say that none but a disciple is eligible to become a Mahant. In that case if the Mahant does not leave a chela behind him, no appointment could at all be made. The

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Mahantship is not hereditary in the sense that on the death of an existing Mahant his chela succeeds to the office as a matter of course. He can acquire rights only by appointment and the authority to appoint is vested in the Bhek and the Sewaka.

Held on evidence that the plaintiff, was eligible for appointment as a Mahant and in fact was so appointed by the Bhek and the Sewaka assembled at Jamsher Thakardwara on the 23rd of July 1945. A I R 1952 Punj 301, *Reversed. Sital Das* v. *Sant Ram*,

A I R 1954 S C 606.

(983) *Succession – Dasi—Custom.*

In the absence of proof of existence of a custom where by dasi daughters succeed to their dasi mother in preference to the married daughters, the rule of propinquity will apply as a rule of justice, equity and good conscience according to which the married and dasi daughters would take the mother's property in equal shares : A I R 1950 Mad 303, *Affirmed*; A I R 1935 Mad 58, *Distinguished.*

No rule can be evolved merely on logical grounds that degraded people are a class by themselves and their degraded relations are preferential heirs to the undegraded ones. Degradation does not and cannot sever the ties of blood and succession is more often than not determined by ties of blood than by the moral character of the heir : 23 Mad 171, *Approved. Saraswathi Ammal* v. *Jagadambal*, A I R 1953 S C 201
=1953 S C R 939=1953 S C J 287.

(984) *Text—Mitakshara, Chap. I, S. 4—Placitum 1 and placitum 28 — Construction of.*

Section 4 of the first Chapter in Mitakshara enumerates various items of property which are exempt from partition and self-acquisition is only one of them. Father's gifts constitute another item in the exemption list which is specifically mentioned in placitum 28 of the section. Thus, the father's gift being itself an exception, the provision in placitum 28 cannot be read as requiring that the gift must also be without detriment to the father's estate, for it would be a palpable contradiction to say that there could be any gift by a father out of the estate without any detriment to the estate. There is no contradiction really between placitum 1 and placitum 28 of the section. Both are separate and independent items of exempted properties of which no partition can be made. Maynes' Hindu Law, Edn. 11,

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Para 280, page 344, *Approved. Arunachala* v. *Muruganatha,* **A I R 1953 S C 495 =1954 S C R 243=1953 S C J 707,**

(985) *Widow—Accretions — Acquisition (Evidence Act (1872), Ss. 101-103).*

There is no presumption that any particular property in the widow's hand is part of her husband's estate because a widow can have properties of her own. The fact that widow purchased them out of the savings made by her from the income of her husband's estate does not necessarily make it an accretion because a Hindu widow has an absolute right to the income and is not bound to save any of it for the reversioners. She can, if she so chooses, add it to the estate and augment it or she can, if she wants, keep it separate and deal with it as her own.

The question is one of intention but it is also one of fact and must be decided as such. Case law relied on. The burden is upon the reversioner to establish that such property formed part of the estate of the propositus because he can claim only property which belonged to the propositus. *Sita Ji* v. *Brijander Narain Ch*, **A I R 1954 S C 601.**

(986) *Widow — Alienation by mortgage —Legal necessity.*

Where an alienation (mortgage) by a Hindu widow is challenged on the ground of want of legal necessity or benefit of estate, the most important thing that would require consideration is the state of things actually existing at the time when the security bond was executed. (Held that there was no necessity for creating mortgage). *Kalishankar Das* v. *Dhirendra Nath,* **A I R 1954 S C 505 =1954 S C J 670.**

(987) Widow — Alienation — Admission by immediate reversioner that alienation was proper is not binding on actual reversioners even though they be his sons — Nobody has a vested right so long as the widow is alive and the eventual reversioner does not claim through anyone who went before him—The actual reversioners do not claim as heirs of their father but as heirs of the last holder — (Hindu Law — Reversioners) (Evidence Act (1872), S. 19). 35 Ind App 1 (P C), *Explained*; A I R 1918 P C 196, *Relied on. Kalishankar Das* v. *Dhirendra Nath,* **A I R 1954 S C 505 =1954 S C J 670.**

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(988) *Widow—Alienation—Legal necessity — Immediate reversioner joining — Presumption.*

When immediate reversioner joins an alienation by way of a mortgage by a Hindu widow, the alienation being by way of a mortgage, no question of surrender can arise. The immediate reversioner must be deemed to have consented to the transaction. Such consent may raise a presumption that the transaction was for legal necessity or that the mortgagor had acted therein after proper and bona fide enquiry and has satisfied himself as to the existence of such necessity. But this presumption is rebuttable and it is open to the actual reversioner to establish that there was in fact no legal necessity and there has been no proper and bona fide enquiry by the mortgagee. 40 Cal 721 (F B), *Approved*; A I R 1918 P C 196, *Relied on., Kalishankar Das* v. *Dhirendra Nath,* **A I R 1954 S C 505 =1954 S C J 670.**

(989) *Widow—Alienation—Legal necessity—Bona fide alienee after due enquiry —Position of.*

The interest of a Hindu widow in the properties inherited by her bears no analogy or resemblance to what may be described as an equitable estate in English law and which cannot be followed in the hands of a bona fide purchaser for value without notice. From very early times the Hindu widow's estate has been described as qualified proprietorship with powers of alienation only when there is justifying necessity, and the restrictions on the powers of alienation are inseparable from her estate. For legal necessity she can convey to another an absolute title to the property vested in her. If there is no legal necessity, the transferee gets only the widow's estate which is not even an indefeasible life estate for it can come to an end not merely on her death but on the happening of other contingencies like re-marriage, adoption, etc. If an alienee from a Hindu widow succeeds in establishing that there was legal necessity for transfer, he is completely protected and it is immaterial that the necessity was brought about by the mismanagement of the limited owner herself. Even if there is no necessity in fact but it is proved that there was representation of necessity and the alienee after making bona fide enquiries satisfied himself as best as he could that such necessity exist-

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ed, then the actual existence of a legal necessity is not a condition precedent to the validity of the sale.

The position, therefore is if there is no necessity in fact or if the alienee could not prove that he made bona fide enquiries and was satisfied about its existence, the transfer is undoubtedly not void but the transferee would get only the widow's estate in the property which does not affect in any way the interest of the reversioner. In such a case an alienee from the transferee cannot claim to acquire any higher rights than what his transferor had. *Kalishankar Das* v. *Dhirendra Nath.*

A I R 1954 S C 505
=1954 S C J 670.

(990) *Widow—Compromise by — When binding on reversioner.*

When the estate of a deceased Hindu vests in a female heir, a decree fairly and properly obtained against her in regard to the estate is in the absence of fraud or collusion binding on the reversionary heir but the decree against the female holder must have involved the decision of a question of title and not merely a question of the widow's possession during her life.

This principle of 'res judicata' is not limited to decrees in suit contested and it is competent to a widow to enter into a compromise in the course of a suit 'bona fide' in the interest of the estate, and not for her personal advantage, and a decree passed on such compromise is binding upon the reversioner. The question whether the transaction is a bona fide settlement of a disputed right between the parties depends on the substance of the transaction and in order that it may bind the estate it should be a prudent and reasonable act in the circumstances of the case. A compromise neither prudent nor reasonable so far as it affected the interests of the estate and that of the ultimate reversioners and made for the personal advantage of a limited owner will not bind the reversioners. A I R 1922 P C 356 and A I R 1915 Cal 629, *Rel. on*; 6 Cal L R 76 and AIR 1925 P C 272, *Ref. Phool Kuer* v. *Prem Kuer,* **A I R 1952 S C 207**
=1952 S C J 296.

(991) *Widow—Nature of estate—Tamliknama in favour of widow, using word 'malik' for her maintenance.*

There is no warrant for the proposition that when a grant of an immovable property is made to a Hindu female she does not get

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an absolute or alienable interest in such property, unless such power is expressly conferred upon her. The position is that to convey an absolute estate to a Hindu female, no express power of alienation need be given; it is enough if words are used of such amplitude as would convey full rights of ownership: 24 W R 395 and 9 Beng L R 377 (P C), *Ref.*

The mere fact that the gift of property is made for the support and maintenance of a female relation cannot be taken to be a *prima facie* indication of the intention of the doner, that the donee was to enjoy the property only during her lifetime. The extent of interest, which the donee is to take, depends upon the intention of the donor as expressed by the language used, and if the dispositive words employed in the document are clear and unambiguous and import absolute ownership, the purpose of the grant would not, by itself, restrict or cut down the interest. The desire to provide maintenance or residence for the donee would only show the motive which prompted the donor to make the gift, but it could not be read as a measure of the extent of the gift: A I R (20) 1933 P C 67, *Rel. on.*

Where, therefore, a Hindu widow relinquished by a written deed all her rights in certain properties and received under a tamliknama two items of property, house and shop, as 'malik,' the deed containing no express words showing that she was to enjoy the property only during her lifetime:

Held, on consideration of all the circumstances, that an absolute estate was conveyed to her by the tamliknama, though the gift was expressed to be for her maintenance and residence: A I R 1944 All 17: ILR (1943) All 892, *Reversed. Ram Gopal* v. *Nand Lal,*

A I R 1951 S C 139
=1950 S C J 575
=1950 S C R 766.

(992) *Widow—Surrender — Nature of —English doctrine of merger distinguished —Nature of widow's estate and life estate —Surrender in favour of next reversioner —Surrenderee can recover possession of the property during life time of widow, from persons who had acquired title to it by adverse possession.*

The word 'surrender' cannot be said to be free from ambiguity. If it connotes nothing more than the English doctrine of

merger and a Hindu widow, whose interest is usually though incorrectly likened to that of a life tenant under the English law, merely accelerates the reversion by surrendering her limited interest in favour of the reversioner, undoubtedly no surrender can be effective if the widow has already parted with her interest in the property by a voluntary act of her own or her rights therein have been extinguished by adverse possession influenced. Some of the judicial pronouncements have really speaking no application to a Hindu widow's estate. The law of surrender by a Hindu widow as it stands at present is for the most part, judge-made law, though it may not be quite correct to say that there is absolutely no textual authority upon which the doctrine could be founded, at least, impliedly.

But though certain terms and expressions of English law have been made use of in a somewhat loose sense, yet the radical idea involved in the doctrine of surrender by a Hindu widow is totally different from what is implied in the merger of a life interest in the reversionary estate under the English Law. In English law the reversioner or remainderman has a vested interest in the property and his rights are simply augmented by the surrender of the life estate. In the Hindu law, on the other hand, the widow, so long as she is alive, fully represents her husband's estate, though her powers of alienation are curtailed and the property after her death goes not to her but to her husband's heirs. The presumptive reversioner has got no interest in the property during the life time of the widow. He has a mere chance of succession which may not materialise at all. He can succeed to the property at any particular time only if the widow dies at that very moment. The whole doctrine of surrender is based upon this analogy or legal fiction of the widow's death. The widow's estate is an interposed limitation or obstruction which prevents or impedes the course of succession in favour of the heirs of her husband. It is open to the widow by a voluntary act of her own to remove this obstruction and efface herself from the husband's estate altogether. If she does that, the consequence is the same as if she died a natural death and the next heirs of her husband then living step in at once under the ordinary law of inheritance. In spite of some amount of complexity which is unavoidable in a law evolved by judicial

decisions, this fundamental basis of the doctrine of surrender can be said to be established beyond doubt.

Thus, surrender is not really an act of alienation of the widow of her rights in favour of the reversioner. The reversioner does not occupy the position of a grantee or transferee, and does not derive his title from her. He derives his title from the last male holder as his successor in law and the rights of succession are opened out by the act of self-effacement on the part of the widow which operates in the same manner as her physical death. It is true that a surrender may and in the majority of cases does take the form of transfer e.g., when the widow conveys the entire estate of her husband, without consideration and not as a mere device to share the estate with the reversioner, in favour of the latter. But it is the self-effacement by the widow that forms the basis of surrender and not the ex facie transfer by which such effacement is brought about.

As surrender conveys nothing in law and merely causes extinction of the widow's rights in her husband's estate, there is no reason why it should be necessary that the estate must remain with the widow before she could exercise her power of surrender. The widow might have alienated the property to a stranger or some one might have been in adverse possession of the same for more than the statutory period. If the alienation is for legal necessity, it would certainly be binding upon the estate and it could not be impeached by any person under any circumstance. But if the alienation is not for legal necessity, or if a squatter has acquired title by adverse possession against the widow, neither the alienation nor the rights of the adverse possessor could affect the reversioner's estate at all. These rights have their origin in acts or omissions of the widow which are not binding on the husband's estate. They are in reality dependant upon the widow's estate and if the widow's estate is extinguished by any means known to law, e.g., by her adopting a son or marrying again, these rights must also cease to exist. The same consequences should follow when the widow withdraws herself from her husband's estate by an act of renunciation on her part. Whether any equitable principle can be invoked in favour of a third party who has acquired rights over the property by any act or omission of

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the widow may be a matter for consideration. As the rights acquired by adverse possession are available only against the widow and not against the husband's heirs, husband's estate still remains undestroyed and the widow may withdraw herself from that estate leaving it open to the reversioners to take possession of it at once as heirs of the last male holder unless there is any other rule of law or equity which prevents them from doing so. A I R 1918 P C 196 at p. 198, *Relied on*; A I R 1952 S C 109 at p. 111, *Ref.*; A I R 1941 Mad 430 at pp, 431, 432, *Approved.*

Though loosely described as a life estate' the Hindu widow's interest in her husband's property bears no analogy to that of a 'life tenant' under the English law. The estate which the Hindu widow takes is a qualified proprietorship with powers of alienation for purely worldly or secular purposes only when there is a justifying necessity and the restrictions on the powers of alienation are inseparable from her estate. The restrictions, which are imposed on the Hindu widow's powers of alienation, are not merely for the protection of the material interest of her husband's relations, but by reason of the opinion expressed by all the Smriti writers that the Hindu widow should live a life of moderation and cannot have any power of gift, sale or mortgage except for religious or spiritual purposes. The Hindu law certainly does not countenance the idea of a widow alienating her property without any necessity, merely as a mode of enjoyment. If such a transfer is made by a Hindu widow, it is not correct to say that the transferee acquires necessarily and in law an interest commensurate with the period of the natural life of the widow or at any rate with the period of her widowhood. Such transfer is invalid in Hindu law, but the widow, being the grantor herself, cannot derogate from the grant and the transfer cannot also be impeached so long as a person does not come into existence who can claim a present right to possession of the property. On the one hand, a Hindu widow has larger rights than those of a life estate holder, inasmuch as, in case of justifying necessity she can convey to another an absolute title to the properties vested in her. On the other hand, where there is no necessity for alienation, the interest, which she herself holds and which she can convey to others, is not an indefeasible life estate but

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an estate liable to be defeated on the happening of certain events which in Hindu Law cause extinction of the widow's estate. Remarriage by the widow is one such event which completely divests her of any interest in her husband's property. Adoption of a son to her husband is another circumstance which puts an end to her estate as heir to her husband the effect of adoption being to bring in a son who has prior claims to succession under the Hindu Law. In both these sets of circumstances, it is not disputed that prior rights derived from the widow, if not supported by legal necessity, could be defeated by the next heir of the husband or the adopted son as the case may be. A I R 1918 Mad 469 (FB), *Rel. on.*

If the effect of surrender is to destroy the widow's estate in the same way as if she suffered physical or civil death, there is no conceivable reason why the reversioner should not, subject to any question of fraud or collusion that might arise, be in a position to recover possession of the properties from an alienee from the widow or from one who has obtained title by adverse possession against her, as none of them could acquire rights except against the widow herself. Surrender is not alienation of an interest of the widow in favour of the reversioner, and no acceptance by the reversioner is necessary as a condition precedent to the vesting of the estate in him. The estate vests in the reversioner under operation of law without any act on his part. Surrender is not a matter of contract between the widow and the reversioner. It is true that the widow at the time of surrendering her husband's estate can, if she likes, stipulate for a right to be maintained out of the properties for her life time; but reservation of such a small benefit absolutely necessary for her maintenance does not invalidate a surrender. There is no warrant in Hindu Law for the proposition that in case of alienation by a Hindu widow of her husband's property without any justifying necessity, or in the case of a stranger acquiring title by adverse possession against her the interest created is to be deemed to be severed from the inheritance and if a surrender is made absolutely by the widow the surrenderee must take it subject to such prior interest. The effect of an alienation by a widow is not to split up the husband's estate into two parts or to give to the alienee an interest necessarily co-extensive with her life-time. The rever-

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sionary right to challenge it is no part of the widow's estate at all and, therefore, could not be surrendered to the reversioner.

Observations of Sulaiman J. in 'AIR 1927 All 258 at p. 263 *approved.*

The widow herself may be incapable of derogating from her own grant and disputing the alienation which she has herself made; but surrender is not an alienation and as the reversioner does not derive his title from her, there is no principle of law under which the acts of the widow could bind him. If the reversioner were a grantee from the widow, he would not only have been estopped from challenging the alienation during her life time, but would have been equally estopped from challenging it after her death; admittedly that is not the case. It is true that the surrender benefits the reversioner but the benefit comes to him under the provision of general law as a result of self-effacement by the widow. No estoppel can possibly be founded on the receipt of such benefit.

Observations of Sulaiman J. in AIR 1927 All 258 at p. 263, *approved.*

Even assuming that the court is not incompetent to impose conditions on the reversioner's rights of recovering possession of the property during the widow's life time on grounds of equity, justice and good conscience in proper cases, in a case where the persons in possession are not alienees from the widow but come upon the land as trespassers, without any right and it is the law of limitation that has legalised what was an act of usurpation, no equitable considerations at all arise.

Thus the reversioners, in whose favour a deed of surrender was executed by a Hindu widow, have a right to recover possession of the properties, belonging to the last male owner, during the life time of the widow from persons who acquired title to the same by adverse possession against the widow. AIR 1950 Bom 55, *Affirmed*; 49 All 334; AIR 1927 All 258; 100 Ind Cas 764; A I R 1935 Pat 175; 156 Ind Cas 774; 48 Mad 933, AIR 1925 Mad 1267: 91 Ind Cas 401, *Overruled*; A I R 1935 Cal 689; AIR 1952 All 875, *Approved. Natwar Lal* v. *Dadu Bhai,*

A I R 1954 S C 61
=1954 S C J 34
=1954 S C R 339.

(993) *Widow—Surrender of estate by—Surrender made in favour of next heir and*

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remote reversioner—It does not operate as valid surrender.

The principle underlying the doctrine of surrender of estate by a Hindu widow is that it cannot possibly be made in favour of anybody except the next heir of the husband. Vesting of the estate in the next reversioner takes place under operation of law & it is not possible for the widow to say that she is withdrawing herself from the husband's estate in order that it may vest in somebody other than the next heir of the husband. Where the surrender is made in favour of the next heir with whom a stranger (in this case, a remote reversioner) is associated and the widow purports to relinquish the estate in order that it may vest in both of them, the surrender not being of the totality of the interest of the widow in favour of the next heir cannot operate as a valid surrender and the relinquishment cannot in law operate as an extinction of her title in the estate. AIR 1952 S. C. 109, *Rel. on. Phool Kuer* v. *Prem Kuer.*

A I R 1952 S C 207
=1952 S C J 296.

(994) *Widow—Surrender — Surrender by widow in favour of next heir and stranger.*

The basis of the doctrine of surrender or relinquishment by the widow of her interest in the husband's estate which has the effect of accelerating the inheritance in favour of the next heir of her husband, is the effacement of the widow's estate and not the *ex facie* transfer by which such effacement is brought about. The result merely is that the next heir of the husband steps into the succession in the widow's place. The effacement may be effected by any process and it is not necessary that any particular form should be employed. All that is required is that there should be a *bona fide* and total renunciation of the widow's right to hold the property and the surrender should not be a mere device to divide the estate with the reversioners. It would be clear from the principle underlying the doctrine of surrender that no surrender and consequent acceleration of estate can possibly be made in favour of anybody except the next heir of the husband. It is true that no acceptance or act of consent on the part of the reversioners is necessary in order that the estate might vest in him; vesting takes place under operation of law. But it is not possible for the widow to say that she is withdrawing herself

from her husband's estate in order that it might vest in somebody other than the next heir of the husband. In favour of a stranger, there can be an act of transfer but not one of renunciation. The position is not materially altered if the surrender is made in favour of the next heir with whom a stranger is associated and the widow purports to relinquish the estate in order that it might vest in both of them. So far as the next heir is concerned, there cannot be in such a case a surrender of the totality of interest which the widow had, for she actually directs that a portion of it should be held or enjoyed by somebody else other than the husband's heir. As regards the stranger, there can be no question of renunciation, the transaction at the most may be evidence of an intention to confer a bounty on him, though such intention is not clothed in proper legal form. *Case law discussed.* A. I. R. (13) 1926 Cal 228: 89 Ind. Cas. 770, *Overruled. Mummareddy* v. *Durairaja.*

A I R 1952 S C 109
=1952 S C J 192.

(995) *Widow—Surrender — Ommission to include small portion of the property—Effect.*

The omission, due to ignorance or to oversight, of a small portion of the whole property does not affect the validity of the surrender when it is otherwise bona fide. *Gopal Singh* v. *Ujagar Singh,*

A I R 1954 S C 579
=1954 S C J 562.

HINDU LAW OF INHERITANCE (AMENDMENT) ACT (1929).

(996) *Preamble and Ss. 1(2) and 2—Scope and object—Act does not apply to succession to stridhan property of a Hindu female.*

The scope of the Act is limited. It governs succession only to the separate property of a Hindu male who dies intestate. It does not alter the law as regards the devolution of any other kind of property owned by a Hindu male and does not purport to regulate succession to the property of a Hindu female at all. *Annagouda* v. *Court of Wards, Satara.*

A I R 1952 S C 60
=1952 S C R 208
=1952 S C J 20.

HINDU WOMEN'S RIGHTS TO PROPERTY ACT (18 of 1937)

(997) *S. 3 (1)—"Property"—Meaning of — Property if includes shebaiti right—*

—Shebaitship—Nature of interest — Succession to—Hindu law—Religious endowment.

The expression 'any property' in S. 3 (1) *prima facie* includes, unless something to the contrary can be spelt out from the other provisions of the Act, all forms or types of interest answering to the description of 'property' in law. Of course, the property must be heritable property in respect to which alone the question of succession may legitimately arise. There is nothing in any of the provisions of the Hindu Women's Rights to Property Act which excludes from the scope & operation of the Act succession to shebaitship which is a recognized form of property in Hindu law. A I R 1945 F C 25, *Expl. & Disting.*

Assuming that the word "property" in Act 18 of 1937 is to be interpreted to mean property in its common & ordinarily accepted sense & is not to be extended to any special or peculiar type of property, succession to shebaitship, even though there is an ingredient of office in it, follows succession to ordinary or secular property. It is the general law of succession that governs succession to shebaitship as well. While the general law has now been changed by reason of Act 18 of 1937, there is no reason why the law as it stands at present should not be made applicable in the case of devolution of shebaitship. *Angurbala* v. *Debabrata,*

AIR 1951 S C 293=1951 S C J 394
=1951 S C R 1125.

HIGH COURT RULES AND ORDERS (CALCUTTA)

(998) *Rules of the High Court, Part I, Chap. II, R. 9, Proviso — Forfeiture of property—Meaning—Order under Ss. 431 and 432, Bengal Municipal Act, 1932 — Nature of — Municipalities — (Bengal Municipal Act (15 of 1932), Ss. 431, 432) —(Words and Phrases—Forfeiture).*

According to the dictionary meaning of the word 'forfeiture' the loss or the deprivation of goods has got to be in consequence of a crime, offence or breach of engagement or has to be by way of penalty of transgression or a punishment for an offence. Unless the loss or deprivation of the goods is by way of a penalty or punishment for a crime, offence or breach of engagement it would not come within the definition of forfeiture.

Hyderabad Co-operative Credit Societies Act (1340F)

The orders mentioned in the Proviso to R. 9 of the Rules of the High Court are purely orders by way of penalty or punishment for the commission of crimes of offences and the forfeiture of property mentioned there is no other than the one which is entailed as a consequence of the commission of a crime or offence.

An order of a Magistrate under Ss. 431 and 432, Bengal Municipal Act, 1932 is not a punishment for a crime but is a measure to ensure that the condemned food or drug is not used as human food or medicine. It is, therefore, not an order for forfeiture of property within the meaning of the Proviso to R. 9 as would bar the jurisdiction of the single Judge to entertain and decide a reference relating to it. *Bankura Muncipality* v. *Lalji Raja & Sons,*

AIR 1953 S C 249.

HYDERABAD CO-OPERATIVE CREDIT SOCIETIES ACT (1340F)

(999) *S. 42 (d) — Registrar — If executing Court—Execution proceedings pending before civil Court — Interference by Registrar.*

On the plain words of S. 42 (d), it cannot be held that the Registrar has been constituted an executing Court or that any powers in the matter of the execution of the award decree have been conferred upon him.

Where after a default had been made in the payment of the first instalment, and the whole decree debt had become due and execution had been taken out for recovery of the amount, the Registrar accepted the amount of the first instalment and asked the executing Court to stop further proceedings :

Held, that the requisition of the Registrar to the executing Court to stop execution proceedings and his act in accepting the first instalment were in excess of the jurisdiction conferred on him and the executing Court was entitled to ignore it. Moreover, the Registrar could not alter or amend the decree passed by the Arbitrator at that stage. *Co-operative Society of Debts* v. *Nandlal.* **AIR 1950 S C 274 =1950 S C R 741.**

HYDERABAD SPECIAL TRIBUNALS REGULATION (5 of 1358F AS AMENDED BY REGULATION OF 30-10-49)

(1000) *S. 2B (i) — Retrospective effect — Sentence of death before amending Regulation — Execution of sentence by hanging—Legality.*

The provisions of S. 2B applied to all sentences which had remained unexecuted or were to be executed at the date of the amending Regulation. They must be taken to have retrospective effect, because the mode of the execution of a sentence can hardly be regarded as a matter of substantive law or something which would affect any substantive rights. Where the High Court upheld the conviction & sentence of death passed by the Special Tribunal had the power to inflict the sentence of death by hanging under the amended Regulation, the fact that at the time of passing the sentence of death by hanging it could be executed only by decapitation is of no avail for relief under Art. 32, Const. Ind. *Janardhan Reddy* v. *State of Hyderabad,* **AIR 1951 S C 217 =1951 S C J 320=1951 S C R 344.**

(1001) *S. 2—Creation of Special Tribunal—(Constitution of India, Art. 14.)*

(Per *Majority*)—It cannot be urged that the creation of a Special Court by itself was an inequality in the eye of law. *Qasim Razvi* v. *State of Hyderabad*

AIR 1953 S C 156.

(1002) *S. 3—Trial of individual case—(Constitution of India, Art. 14.)*

(Per *Majority.*) — Section 3 empowers the Military Governor to direct a Special Tribunal to try an offence committed by a particular person, in other words, to try an individual case. *Qasim Razvi* v. *State of Hyderabad,* **AIR 1953 S C 156.**

(1003) *Ss. 3, 4 — Cognizance by special tribunal—(Constitution of India, Arts 13, 14).*

(Per *Majority*).—No exception could be taken to the Special Tribunal's taking cognizance of the case under an order of the Military Governor when this happened long before the advent of the Constitution. *Qasim Razvi* v. *State of Hyderabad,*

AIR 1953 S C 156.

(1004) *S. 4—Proceedings in English — (Constitution of India, Art. 14).*

(Per *Majority; Bose and Ghulam Hasan JJ., Contra).* — The provision in the Re-

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gulation relating to proceeding being conducted in English if the tribunal so desires, *per se*, does not violate the equal protection clause in the Constitution. *Qasim Razvi* v. *State of Hyderabad*,

AIR 1953 S C 156.

(1005) *S. 4—Summary trial — (Constitution of India, Art 14).*

The provision relating to summary trial irrespective of the nature of the offence and also that relating to recording of evidence in a summary manner may be considered prejudicial to the accused and may normally deprive him of benefits which are enjoyed by other persons similarly situated who are tried under the ordinary law. *Qasim Razvi* v. *State of Hyderabad*,

AIR 1953 S C 156.

(1006) *S. 4 (1) — Validity — (Constitution of India, Art. 14).*

(Per *Majority; Bose and Ghulam Hasan JJ., Contra)*—The elimination of the committal proceeding is not by itself a substantial departure from the normal procedure. *Qasim Razvi* v. *State of Hyderabad*,

A I R 1953 S C 156.

(1007) *S. 4 (7)—Warrant procedure — (Constitution of India, Art. 14).*

(Per *Majority; Bose and Ghulam Hasan JJ. Contra)* — The substitution of warrant procedure for sessions procedure did not constitute a substantial difference. *Qasim Razvi* v. *State of Hyderabad*,

A I R 1953 S C 156.

(1008) *S. 7—Right of second appeal — (Constitution of India, Art. 14).*

(Per *Majority*) — It could not be held that the provision for appeal contained in the Regulation deprived the accused of the right of second appeal which is allowed under the Hyderabad Code. *Qasim Razvi* v. *State of Hyderabad*,

A I R 1953 S C 156.

(1009) *S. 7 —Confirmation of sentence — (Constitution of India. Art. 14).*

(Per *Majority; Bose and Ghulam Hasan JJ. Contra)*—The question of confirmation of sentence was not at all relevant when the sentences passed upon the accused did not require any confirmation under the Hyderabad Criminal Procedure Code. *Qasim Razvi* v. *State of Hyderabad*,

A I R 1953 S C 156.

(1010) *S. 7— Absence of provision for revision and transfer — (Constitution of India, Art. 14).*

Hyderabad Special Tribunals (Termination)and Special Judges (Appointments) Regulation (1359F)

(Per *Majority ; Bose and Ghulam Hasan JJ. Contra).*— Regarding omission of the provisions relating to revision and transfer in the Regulation the grievance of the accused was more imaginary than real. *Qasim Razvi* v. *State of Hyderabad.*

A I R 1953 S C 156.

(1011) *S. 7 (2) — Sentence of death by Special Tribunal — Want of assent of H. E. H. the Nizam for execution— Legality —(Hyderabad Cr. P. C., Ss. 20, 307 & 308).*

The provisions of S. 7 (2) cover all those cases where *manzuri & tashih* were contemplated under the Hyderabad Cr. P. C., S. 20 shows that the word *manzuri* has not been used with reference only to H. E. H. the Nizam but it has also been used with reference to the H. C. & the Government. In the context in which it is used it has no other meaning than the act of confirmation, and the new word, "*tausiq*" which has been used in the Regulation, and which literally means confirmation, appears to convey the same sense as the word "*manzuri.*" It is quite plain that one of the objects of the Regulations was to simplify procedure and expedite trials. Hence, the contention that a sentence of death passed by the Special Tribunal cannot be executed without the assent or approval of H. E. H. the Nizam cannot be sustained. *Janardhan Reddy* v. *State of Hyderabad*,

A I R 1951 S C 217 =1951 S C J 320=1951 S C R 344.

HYDERABAD SPECIAL TRIBUNALS (TERMINATION) AND SPECIAL JUDGES (APPOINTMENTS) REGULATION (10 of 1359F).

(1012) *S. 4 —Validity — (Constitution of India, Art. 14).*

It is not possible to say that the appointment of a Special Judge was in itself an inequality in the eye of the law. *Habeeb Mohamed* v. *The State of Hyderabad*,

A I R 1953 S C 287=1953 S C J 361 =1953 S C R 661.

(1013) *S. 5 — Validity — (Constitution of India, Art. 14).*

Under the Hyderabad Criminal Procedure Code, the committal proceeding is not an indispensable preliminary to a Sessions

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trial, and its absence does not operate to take away the jurisdiction of the Special Judge to take cognizance of the case before the Constitution. The difference between a warrant procedure prescribed by the Regulation to be followed by the Special Judge after such cognizance was taken and the sessions procedure at that stage applicable under the General law is not at all substantial, and the minor differences would not bring the case within the mischief of Art. 14 of the Constitution : A I R 1953 S C 156, *Foll. Habeeb Mohamed* v. *The State of Hyderabad,* **A I R 1953 S C 287 =1953 S C J 361=1953 S C R 661.**

(1014) *S. 5 (b)—Validity—(Constitution of India, Art. 14).*

The delegatee can certainly be described by reference to his official designation and the authority may be vested in the holder of a particular office for the time being. *Habeeb Mohamed* v. *The State of Hyderabad,* **A I R 1953 S C 287 =1953 S C J 361=1953 S C R 661.**

(1015) *S. 8— Validity — (Constitution of India, Art. 14).*

Section 8 must be held to be invalid to the extent that it takes away the provision relating to confirmation of sentences as is contained in the Hyderabad Criminal Procedure Code. This, however, is a severable part of the section and being invalid, the provisions of the Hyderabad Criminal Procedure Code with regard to the confirmation of sentences must be followed. Those provisions, however, do not affect in any way the procedure for trial laid down in the Regulation. The proper stage when S. 20, Hyderabad Criminal P. C., comes into operation is the stage of execution of the sentence. *Habeeb Mohamed* v. *The State of Hyderabad,* **A I R 1953 S C 287 =1953 S C J 361=1953 S C R 661.**

(1016) *S. 8— Validity — (Constitution of India, Art. 14).*

Not only the right of an accused to apply for transfer of his case has not been taken away by S. 8, but the right of revision also has been left unaffected except to a small extent. *Habeeb Mohamed* v. *The State of Hyderabad,* **A I R 1953 S C 287 =1953 S C J 361=1953 S C R 661.**

INCOME TAX ACT (1922)

(1017) *S. 1 — Interpretation of Act.*

The provisions of the Income-tax Act in respect to exemptions and deductions cannot be construed on the analogy of the provisions contained in the charging sections of the Act even if the language of these provisions is similar. *I. T. Commr.* v. *K. Shrinivasan,* **A I R 1953 S C 113 =1953 S C R 486 =1953 S C J 115.**

(1018) *S. 1—Use of Income Tax Manual in interpretation of Act.*

The interpretation placed by the department on any provision of the Act cannot be considered a proper guide when the construction of the statute is involved. *I. T. Commr.* v. *K. Shrinivasan,* **A I R 1953 S C 113 =1953 S C R 486 =1953 S C J 115.**

(1019) *S. 1—Validity of Act—(Government of India Act (1935), Sch. VII, List 1, entry 54).*

It will be wrong to interpret the word 'income' in entry 54 in the light of any supposed English legislative practice. The word should be given its widest connotation in view of the fact that it occurs in a legislative head conferring legislative power. The Act of 1947 which amended the Income Tax Act by enlarging the definition of the term income in S. 2 (6-C) and introducing a new head of income in S. 6 and inserting the new S. 12B is therefore intra vires the powers of the Central Legislature acting under entry 54 in List I of the Seventh Schedule of the Government of India Act. A I R 1932 P C 138, *Explained. Navinchandra* v. *Commr. of I. T. Bombay,* **A I R 1955 S C 58.**

(1020) *Ss. 2 (14-A), Proviso (b) (i) and (iii), 3, 4 — Income derived by assessee in 1949-1950 in Rajasthan — Imposition of income tax. A I R 1951 Raj 94 (2), Reversed.*

The words "any period" in S. 2 (14-A), Proviso (b) (i) must be understood as referring to any period before or after 31-3-1950.

All that S. 2 (14-A) does is to define what the expression "Taxable territories" means in certain cases and for certain purposes wherever that expression is used in the various provisions of the Income-tax Act. And as the expression is used in the charging S. 4 in connection with the conditions which

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are to determine liability to tax, sub-clause (iii) of Cl. (b) of the definition must, when read with S. 4 of Income-tax Act have reference to chargeability of income.

The result is that Ss. 3 and 4 of the Income-tax Act, in the light of the definition in proviso (b) to the amended S. 2 (14-A) and S. 2 of the Indian Finance Act, 1950 authorise the imposition of the Indian Income-tax and super-tax on the income derived by an assessee in the year 1949-50 in the territory of Rajasthan. A I R 1951 Raj 94 (2), *Reversed. Union of India* v. *Madan Gopal*, **A I R 1954 S C 158 =1954 S C R 541 =1954 S C J 110.**

(1021) *S. 2 (14-A) (as amended by Finance Act, 1950)—Validity — A I R 1951 Rajasthan 94 (2), Reversed — (Constitution of India, Arts. 245 and 246 and Sch. VII, List 1)—(Government of India Act (1935), S. 101).*

While it is true that the Constitution has no retrospective operation, except where a different intention clearly appears, it is not correct to say that in bringing into existence new Legislatures and conferring on them certain powers of legislation, the Constitution operated retrospectively. The legislative powers conferred upon Parliament under Art. 245 and Art. 246 read with List I of the Seventh Schedule could obviously be exercised only after the Constitution came into force, and no retrospective operation of the Constitution is involved in the conferment of those powers. But it is a different thing to say that Parliament in exercising the powers thus acquired is precluded from making a retroactive law. The question must depend upon the scope of the powers conferred, and that must be determined with reference to the terms of the instrument by which, affirmatively, the legislative powers were created and by which, negatively, they were restricted. Nor can it be said, in strictness, that the Finance Act, 1950 is retroactive legislation. 4 Cal 172 (P C), *Rel on*; 37 C L R 36, *Not approved.*

Section 101, Government of India Act, 1935, which was kept alive by S. 6 of the General Clauses Act, created no right or privilege in the subjects of the United State of Rajasthan which, notwithstanding the repeal of that section could be regarded as still enuring for their benefit. When that section along with the rest of the Government of India Act, 1935, was repealed by

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the new Constitution which has created new Legislatures with power to make retroactive laws, it is idle to suggest that rights or privileges acquired while the old Constitution Act was in force are preserved for ever by S. 6 of the General Clauses Act, which can have no application to such cases.

It follows that the amendment of S. 2 (14-A) of the Income-tax Act, by the Finance Act 1950, so as to authorise the levy of tax on income accruing in the territory of Rajasthan in the year 1949-50 is within the competence of Parliament and therefore valid. *Union of India* v. *Madan Gopal*, **A I R 1954 S C 158 =1954 S C R 541 =1954 S C J 110.**

(1022) *S. 2(1)(a)—Agricultural income —Exemption from tax—Policy and object of Act.*

The policy of the Act as gathered from the various sub-clauses of section 2 (1) appears to be to exempt agricultural income from the purview of Income Tax Act. The object appears to be not to subject to tax either the actual tiller of the soil or any other person getting land cultivated by others for deriving benefit therefrom; but to say that the benefit intended to be conferred upon this class of persons should extend to those into whosesoever hands that revenue falls, however remote the receiver of such revenue may be is hardly warranted. *Bacha F. Guzdar* v. *Commr. of I. T. Bombay*, **A I R 1955 S C 74.**

(1023) *S. 3—'Accrue'—Accrual does not depend on accounting — Right to income, profits or gains must however have vested in assessee.*

Das and Bhagwati JJ. — It is no doubt true that the accrual of income does not depend upon its ascertainment or the accounts cast by assessee. The accounts may be made up at a much later date. That depends upon the convenience of the assessee and also upon the income. Profits or gains may thus be ascertained later on the accounts being made up. But when the accounts are thus made up the income, profits or gains ascertained as the result of the account are referred back to the chargeable accounting period during which they have accrued or arisen and the assessee is liable to tax in respect of the same during that chargeable accounting period. The computation of the profits whenever it may take

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place cannot possibly be allowed to suspend their accrual. The quantification of the commission is not a condition precedent to its accrual. A I R 1953 S C 527 (530), *Rel. on.* (1924) 12 Tax Cas 768; (1924) 12 Tax Cas 927, *Ref. E. D. Sasoon & Co. Ltd.* v. *I. T. Commr., Bombay,*

A I R 1954 S C 470.

(1024) *S. 4—Sale of Goods Act (1930), Ss. 23 and 25 — Sale of unascertained or future goods — Passing of property in goods to buyer — Assessee company in India selling goods to buyer outside India — Profits derived from such sale.*

Section 23 of the Sale of Goods Act lays down that where there is a contract for the sale of unascertained or future goods by description and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. The requirement of the section is not only that there shall be appropriation of the goods to the contract but that such appropriation must be made unconditionally. This is further elaborated by S. 25 of that Act which provides that where there is a contract for the sale of specific goods or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled. In such a case, notwithstanding the delivery of the goods to the buyer, or to a carrier or other bailee for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled.

Placing of the goods on board the steamer named by the buyer (a foreigner residing outside India) under a F. O. B. contract discharges the contractual liability of the seller as seller and the delivery to the buyer is complete and the goods may thenceforward be also at the risk of the buyer against which he may cover himself by taking out an insurance. Prima facie such delivery of the goods to the buyer and the passing of the risk in respect of the goods from the seller to the buyer are strong indications as to the passing also of the property in the goods to the buyer but they are not decisive and may be negatived, for under S. 25 the seller may yet reserve to himself the right of disposal

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of the goods until the fulfilment of certain conditions and thereby prevent the passing of property in the goods from him to the buyer.

An assessee company carrying on its business in India shipped the goods to American and European buyers outside India under bill of lading issued in its own name. Under the contract it was not obliged to part with the bill of lading (which is the document of title) to the goods until the bill of exchange drawn by it on the buyers' Bank in London where the irrevocable letter of credit was opened was honoured. Upon the terms of the contracts in this case and the course of dealings between the parties the property in the goods could not have passed to the buyer earlier than the date when the bill of exchange was accepted by the buyers' Bank in London and the documents were delivered by the assessee company's agent, the Eastern Bank Ltd., London, to the buyers' Bank. This always took place in London.

Held that at the earliest the property in the goods passed in London where the bill of lading was handed over to the buyers' Bank against the acceptance of the relative bill of exchange; that the sales took place outside British India and, ex hypothesi, the profits derived from such sales arose outside British India.

It was held further on the terms of the contracts in this case that the first receipt of the price of goods sold to American and European buyers was by the Eastern Bank Ltd., London, on behalf of the sellers. The balance of the price ascertained after weighment and assay and deducting the amount paid on the bill of exchange was similarly received in London by the Eastern Bank Ltd. London, on behalf of the assessee company. The subsequent adjustment made in the books of the Eastern Bank Ltd., London did not operate as a receipt of profits in British India. Hence, the profits derived by the assessee company from the sales made to such buyers were received outside British India. (1917) A. C 586 (589), *Rel. on.*; A. I. R. 1952 Mad 198, Affirmed. *Commr. of I. T. Madras* v. *Mysore Chromite Ltd.*

A I R 1955 S C 98.

(1025) *Ss. 4, 10 — Accruing of income.*

The amount in question was the commission earned by the assessee, as managing agents of a Company. In the books of the company maintained by the assessee the aforesaid sum was debited as an item of

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revenue expenditure and the profits were computed after deducting that sum. The amount was simultaneously credited to the managing agents, commission account.

Held that under these circumstances, the aforesaid sum was income which had accrued to the assessee and it did not cease to be income by reason of the fact that on the 30th March the sum was carried to the suspense account by a resolution of the Directors of the company as a result of the request made by the assessee, that the outstanding debt due from it to the company may be written off. Though the sum was not drawn ay the assessee that can hardly affect the question of its liability to tax, once it is established that the income had accrued or arisen to the assessee. The mere fact that the company was withholding payment on account of a pending dispute cannot be held to mean that the amount did not accrue to the assessee. 1924 A. C. 508, (1935) 2 K. B. 351; A. I. R. 1914 P. C. 230, *Distinguished. I. T. Commr.* v. *Thiagaraja*,

A I R 1953 S C 527 = 1954 S C R 258 = 1953 S C J 734.

(1026) *S. 4 — Accruing of income.*

It is not correct to say that profits do not accrue unless and until they are actually computed. The computation of the profits whenever it may take place cannot possibly be allowed to suspend their accrual. *I. T. Commr.* v. *Thaiagaraja*,

A I R 1953 S C 527 = 1954 S C R 258 = 1953 S C J 734.

(1027) *Ss. 4, 42 (1) — 'Deemed to accrue' — Meaning — Scope of S. 42 (1) — (Words and Phrases — Deemed).*

The terms "deemed" in S. 4 brings within the net of chargeability income not actually accruing but which is supposed notionally to have accrued. It involves a number of concepts. By statutory fiction income which can in no sense be said to accrue at all may be considered as so accruing. Similarly, the fiction may relate to the place, the person or be in respect of the year of taxability.

Section 42 (1) defines what income is deemed to accrue within taxable territories. It is only by application of this definition that one class of income "deemed to accrue to a resident within taxable territories" within the meaning of S. 4 (1) (b) (i) can be estimated. *I. T. Commr.* v. *Bhogilal Laherchand*, **AIR 1954 S C 155=1954 S C R 444= 1954 S C J 122.**

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(1028) *S. 4 (1) (a) — Receipt in India.*

(Per *Majority; Bose J.* Contra): — Non-resident Company—Accounts regularly kept according to mercantile system—Company having guaranteed broker in British India —Amounts of sales bills in the first instance debited by company in its books to account of broker but sale proceeds paid by respective merchants to the broker in British India and either credited by broker in Company's accounts with banks or shroffs in British India, or disbursed in accordance with instructions of the Company in British India — Held the moneys were neither received by the Company nor could be deemed to have been received by it when entries were made in books of account at a place out of British India—They were first received in British India when they were received by the broker from the merchants on behalf of the Company and were liable to tax under S. 4 (1) (a). *Case law discussed. Keshav Mills Ltd.* v. *I.-T. Commr.*

A I R 1953 S C 187 =1953 S C R 950=1953 S C J 243.

(1029) *S. 4 (1) (a)—Receipt in British India.*

(Per *Majority; Bose J.* Contra):—Non-resident Company—Accounts regularly kept according to mercantile system—Amounts of sales bills debited in the first instance by Company to accounts of respective merchants in books of account but relative railway receipts sent to banks or shroffs in British India together with drafts or hundis with instructions that delivery of railway receipts should be given to merchants against payments—Held moneys were first received in British India on behalf of the company by the various banks or shroffs through whom the railway receipts were negotiated and were liable to tax under S. 4 (1) (a). *Keshav Mills Ltd.* v. *I.-T. Commr.* **A I R 1953 S C 187 =1953 S C R 950=1953 S C J 243.**

(1030) *S. 4 (1) (a)—Income received by foreign Association through its agent — (Contract Act (1872), Ss. 217 and 221).*

The right of retainer and lien conferred on the agent does not make the amount received by the agent on behalf of the principal any the less the property of the principal. The principal is the full owner and has complete control over his properties in the hands of the agent subject only to the latter's statutory right of retainer and lien. Where, therefore, the entire sale pro-

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ceeds arising out of goods sent by a foreign Association are received by its agents in India they are received on behalf of the Association and belong to it subject to the rights of the agents. *Turner Morrison & Co.* v. *I.-T. Commr.* **AIR 1953 S C 140 =1953 S C R 520=1953 S C J 181.**

(1031) *S. 4 (1) (a) — Receipt in India.*

When the gross sale proceeds are received by an agent in India he necessarily receives whatever income, profits and gains are lying dormant or hidden or otherwise embedded in them. Of course, if on the taking of accounts it be found that there is no profit during the year then the question of receipt of income, profits and gains would not arise but if there are income, profits and gains, then the proportionate part thereof attributable to the sale proceeds received by the agent in India are income, profits and gains received by him at the moment the gross sale proceeds are received by him in India and that being the position the provisions of S. 4 (1) (a) are immediately attracted and the income, profits and gains so received become chargeable to tax under S. 3 of the Act: *Case law referred. Turner Morrison & Co.* v. *I.-T. Commr.*, **A I R 1953 S C 140 =1953 S C R 520=1953 S C J 181.**

(1032) *S. 4 (1) (a)—Scope.*

Section 4 (1) (a) in terms is, unlike S. 4 (1) (b) or (1) (c), not confined in its application, to any particular category of assessees. S. 4 (1) (a) is general and applies to a resident or a non-resident person. The second proviso to S. 4 (1), although it relates to the case of a person not ordinarily resident, also indicates that income, profits and gains which accrue or arise to such a person without the taxable territories can become chargeable to tax under S. 3 read with S. 4 (1) (a): A I R 1952 Cal 403, *Affirmed. Turner Morrison & Co.* v. *I.-T. Commr.*, **A I R 1953 S C 140 =1953 S C R 520=1953 S C J 181.**

(1033) *S. 4 (1) (a) — Receipt in India.*

The assessee was a non-resident company incorporated and carrying on business in the former Aundh State outside British India. In the relevant accounting years the assessee secured some contracts for the supply of goods manufactured by it to the Government of India. Under Cl. 15 of the agreement payments for the delivery of the goods were to be made on submission of the bills in the prescribed form, by cheques on

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a branch of the Reserve Bank or Imperial Bank of India transacting Government business. The assessee used to submit the bills in the prescribed form and on the form used to write "kindly remit the amount by cheque in our favour on any Bank in Bombay." All payments for the goods supplied were made by cheques drawn by the Government department at Delhi on the Reserve Bank of India Bombay Branch. These cheques were received by the assessee company at it's office in Aundh State by post, and were honoured in due course by the Reserve Bank at Bombay.

Held that (i) on the facts and circumstances of the case that the income profits or gains in respect of the sales made to the Government of India were received by the assessee in British India within the meaning of S. 4 (1) (a)

(ii) According to the course of business usage in general to which as part of the surrounding circumstances, attention has to be paid the parties must have intended that the cheques should be sent by post which is the usual and normal agency for transmission of such articles and according to the Tribunal's findings they were in fact received by the assessee by post. Apart from the implication of an agreement arising from such business usage the assessee expressly requested the Government to "remit" the amounts of the bills by cheques. This, clearly amounted in effect to an express request by the assessee to send the cheques by post. The Government did act according to such request and posted the cheques in Delhi. It could scarcely be suggested with any semblance of reasonable plausibility that cheques drawn in Delhi and actually received by post in Aundh would in the normal course of business be posted in some place outside British India. This posting in Delhi, in law, amounted to payment in Delhi. *I.-T. Commr.* v. *M/S. Ogale Glass Works. Ltd.* **AIR 1954 SC 429=1954 S C J 577**

(1034) *S. 4 — Payment by cheque — Assessee in Indian State contracting with Government of India for supply of goods manufactured in Indian State.*

The facts found in the case were similar to those found in AIR 1954 S C 429, except in the following particulars (1) that all cheques were made non-negotiable, (2) that no credit was given by the bank to the assessee before collection, (3) that there was no finding that the assessee gave credit to the Gov-

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ernment for the amount of the cheque immediately on receipt thereof.

Held that on the facts of the case, income, profits and gains in respect of sales made to Government of India were received in British India within the meaning of S. 4 (1) (a) of the Act: AIR 1952 Bom 306, *Reversed*. A I R 1954 S C 429, *Foll. I. T. Commr.* v. *Kirloskar Bros.*

A I R 1954 S C 504.

(1035) *Ss. 4 (1) (a), 4-A (c) (b) and 42 (1) and (3) — Goods manufactured outside India — Sales in India and outside India — Payments received in India — Mode of assessment: A I R 1951 Mad 600, Reversed.*

The assessee company incorporated in the United Kingdom had its registered office in London. It owned a Spinning and Weaving Mill at Pondicherry where it manufactured yarn and cloth. The yarn and cotton manufactured in Pondicherry were sold mostly in British India through its agents in India and partly outside British India. In the accounting years, all the contracts in respect of the sales in British India were entered into in British India and the deliveries were made and payments received in British India. In regard to the sales outside British India also, payments in respect of such sales were received in India through the said agents.

Held (i) that in view of the finding of fact that the entire profits were received in India and the company was liable to tax under S. 4 (1) (a), the provisions of S. 42 (1) had no relevancy, A I R 1953 S C 140, *Rel. on.*

(ii) that the income received in British India could not be said to wholly arise in India within the meaning of S. 4 A (c) (b) and that there should be allocation of the income between the various business operations of the assessee company demarcating the income arising in the taxable territories in the particular year from the income arising without taxable territories in that year for the purposes of S 4 A (c) (b), on the general principle of apportionment of income, profits or gains. Section 42 had no relevance to the determination of this question because it is mainly concerned with income which is deemed to have arisen or accrued and not with income which actually arises or accrues within taxable territories. Section 42 (3) also is a part of the scheme which is enacted in S. 42 and cannot help in the determination of the question. A I R 1950 S C 134 *Rel. on*; A I R 1951 Mad 600, *Reversed. Anglo French Tax Co.* v. *I. T. Commr.* **AIR 1954 S C 198=1954 S C R 523= 1954 S C J 76.**

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(1036) *S. 4 'Income' — 'Accrue' — 'Earned'—Meaning of.*

Per *Das and Bhagwati JJ.*: Income may accrue to an assessee without the actual receipt of the same. If the assessee acquires a right to receive the income, the income can be said to have accrued to him though it may be received later on its being ascertained. The basic conception is that he must have acquired a right to receive the income. There must be as is otherwise expressed 'debitum in presenti solvendum in futuro'. Unless and until there is created in favour of the assessee a debt due by somebody it cannot be said that he has acquired a right to receive the income or that income has accrued to him. (1946) 1 All E R 532 (539); (1883) 11 Q B D 518 (522); (527); A I R 1951 Mad 551 (553-54) A I R 1950 S C 134 (154); (1888) 21 Q B D 52, A I R 1925 Cal 34 (43); A I R 1932 P C 138 (140). *Relied.*

The word 'earned' even though it does not appear in S. 4 of the Act has been very often used in the course of the judgments by learned Judges both in the High Courts as well as the Supreme Court. The concept however cannot be divorced from that of income accruing to the assessee If income has accrued to the assessee it is certainly earned by him in the sense that he has contributed to its reduction or the parenthood of the income can be traced to him But in order that the income can be said to have accrued to or earned by the assessee it is not only necessary that the assessee must have contributed to its accruing or arising by rendering services or otherwise but he must have created a debt in his favour. A debt must have come into existence and he must have acquired a right to receive the payment. Unless and until his contribution or parenthood is effective in bringing into existence a debt or a right to receive the payment or in other words a 'debitum in presenti, solvendum in futuro' it cannot be said that any income has accrued to him. The mere expression 'earned' in the sense of rendering the services etc., by itself is of no avail. *E. D. Sasoon & Co. Ltd.* v. *I. T. Commr. Bombay,* **AIR 1954 SC 470.**

(1037) *Ss. 4 (1) (a), 12A, 26 (2)—Test under S. 4(1) (a) is whether any income had accrued to transferor within charge-*

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able period—Managing Agents of company paid commission after yearly accounts, every year—Transfer of Managing Agency in the middle of chargeable year—Commission paid to transferee Income for period of year before date of transfer does not accrue to transferor—Income accrues at the end of year—S. 26 (2) has no application—S. 36, T. P. Act also has no application—S. 36, T. P. Act applies in absence of contract to contrary between transferor and transferee—(T. P Act (1882), S. 36) —(Contract Act (1872), S. 219).

Per *Das and Bhagwati JJ.*—(Jagannadhadas J. Contra): In the case of assignment of managing agency, the true test under S. 4 (1) (a) of the Income tax Act is not whether the transferors and the transferees had worked for any particular periods of the year but whether any income had accrued to the transferors and the transferees within the chargeable accounting period. It is not the work done or the services rendered by the person but the income received or the income which has accrued to the person within the chargeable accounting period that is the subject-matter of taxation That is the proper method of approach while considering the taxability or otherwise of income and no considerations of the work done for broken periods or contribution made towards the ultimate income derived from the source of income nor any equitable considerations can make any difference to the position which rests entirely on a strict interpretation of the provisions of S. 4 (1) (a) of the Income-tax Act. A I R 1952 Bom 330, Reversed.

S. and Co., Ltd. were the managing agents of S. U. Ltd. for a term of 30 years. Under the managing agency agreements with S. U. Ltd. S. and Co., Ltd. were to receive certain commission p. a. on the annual net profits as their remuneration. The commission was to be due yearly on 31st March and was to be paid immediately after the annual accounts of the company had been passed by the shareholders. The agreement empowered the agents (S. and Co., Ltd.) to assign the office of the managing agents and also the whole or any portion of their earning under the agreement. There were negotiations for the transfer of the managing agency and the terms of the transfer were agreed upon in September 1943. By this agreement it was provided that in the event of the transaction being completed, the transferee firm (Messrs. A & Co. Ltd.) would

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be entitled to receive the commission payable under the managing agency agreement on the profits for the calendar year 1943. The managing agency changed hands on 1-12 43. The agency commission for the year 1943 was paid to the transferee firm (Messrs. A & Co., Ltd.) in 1944. The S. and Co., Ltd. were assessed for "escaped income" on the basis that they had earned the income by rendering services as Managing Agent to the Company for the period that they continued to be the Managing Agents (i.e. upto 1-12-1943) and the transferees had rendered the services for the balance of the periods completing the full year of accounting and had earned the proportionate commission and therefore the amount of commission which the latter actually received included the S: & Co., Ltd.'s share of commission in respect of which they were not liable to tax but the S. & Co., Ltd. The High Court adopted this test of the services rendered by the S. & Co. Ltd. as well as the transferees during the whole of the year and considered the proportions of the services rendered by the S. & Co., Ltd., and the transferees as the Managing Agents of the Company as decisive of the portions of the Managing Agency commission earned respectively by each. The parenthood of the income received by the transferees was considered to be the real test of the apportionability of the amounts of the managing agency commission and the total amount of the managing agency commission was thus apportioned between the S. & Co., Ltd. and the transferee in the proportion of 11 to 1. The share of S. & Co., Ltd. of the income was thus considered as having been earned by them during the year 1943 and was held on the construction of the deed of assignment and transfer executed by them in favour of the transferee as having been assigned by them to the transferee and even though the transferee received the whole of the managing agency commission payable by the Company to the Managing Agents under the terms of the Managing Agency Agreement, the S. & Co., Ltd. the assignors and not the transferee were assessed to tax in respect of the proportionate shares of income earned by the S. & Co., Ltd. in the year 1943.

Per *Das & Bhagwati JJ.*—(Jagannadhadas J. Contra): Held (i) on construction of the managing agency agreement that the commission paid to the Managing Agent

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was an annual payment calculated upon the annual net profits of the Company and was to be due to the Managing Agents yearly on the 31st March in each and every year. Unless and until the annual net profits of the Company were determined, the 7½ per cent. commission could not be ascertained but the sum nonetheless became due on the 31st March in each and every year following the close of the accounting year of the company. The amount of such commission did not become a debt owing by the company to the Managing Agents until the 31st March in each and every year and was to be paid immediately after the annual accounts of the Company had been passed by the share-holders. Until and unless the accounting year of the Company had gone by and the Managing Agents had served the Company as their Agents for the full period no part of the managing agency commission which was payable per year in the manner aforesaid could become due to them. The Managing Agency Agreement was an entire and indivisible contract stipulating a payment of remuneration or commission per year and enjoined upon the Managing Agents the duty and obligation of rendering the services to the Company for the whole year by way of condition precedent to their earning any remuneration or commission for the particular accounting year. (Section 219, Contract Act referred): (1888) 39 Ch D 339; (1921) 2 K B 766; (1912) 28 T L R 30; (1876) 33 L T 816, *Rel. on.*; 1 Meg 385, *Disting.*

(ii) Whatever be the position as between the transferor and the transferee, whatever be their arrangements inter se, whatever be the periods of the year during which they might have served the Company in their capacity as the Managing Agents, the Managing Agents as described in the recitals and clauses of the Managing Agency Agreement were one entity and no severance of such periods of service during the course of a particular year was ever contemplated under the agreement. On assignment, the transferee became the Managing Agent as if its name had been inserted in the Managing Agency Agreement from the beginning. For the future period the transferor effaced itself and the transferee took the place of the transferor and preserved the continuity of the Managing Agency so that whoever happened to satisfy the description of the Managing Agents at the time when the

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commission for the accounting year became due to the Managing Agents thus described, which was expressly stated to be due yearly on the 31st March in each and every year, became entitled to receive the debt which thus became due and to the payment thereof after the annual accounts of the company had been passed by the shareholders.

(iii) What would happen however on the expiration of the period of the Managing Agency Agreement (30 years) could not affect the construction of the relevant terms of the Agreement which had reference to a year or years during the continuance of the Agreement.

(There was similar assignment by S. and Co. Ltd., of the Managing Agency of another company. In the agreement of the Managing Agency there was no such term that the remuneration or the commission of the agency would become due and would be payable annually. In this agreement, it was however provided that the commission calculated at 10 per cent. of the net profits of the Company was to become due to them and was to be paid by the Company to them during the continuance of the Agreement. The question for determination was what was the full implication of the clause—"the commission of 10 per cent. on the net profits of the company" :

Held that ordinarily in the case of business or trading concerns accounts of profits are not made except at stated intervals usually separated by a year. Particularly in the case of limited companies incorporated under the Indian Companies Act the accounts are cast every year and the net profits earned by the company are ascertained every year both for the declaration of dividends and for submitting the returns to the income-tax authorities. Having regard to the course of business which prevailed in this Company also so far as it was evidenced by the fact that the account of the Managing Agency Commission was made up for the calendar year 1943 and was paid to transferee who became the Managing Agents in place and stead of the transferor in the year 1944, it was reasonable to assume that the accounts of this Company were throughout made up at the end of every calendar year. The profit and loss of the Company was then ascertained and a commission of 10 per cent. on the net profits of the Company was paid to the Managing Agents of the Company for the time being. Thus there

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would be justification in treating the terms and conditions in regard to the payment of Managing Agency commission in both these Managing Agency Agreements as on a par with each other stipulating for such payment per year on the net annual profits of the Companies).

If this be the true construction of the Managing Agency Agreements it follows that the contract of service between the Companies and the Managing Agents was entire and indivisible, that the remuneration or commission became due by the Companies to the Managing Agents only on completion of a definite period of service and at stated periods, that it was a condition precedent to the recovery of any wages or salary in respect thereof, that the service or duty should be completely performed, that such remuneration constituted a debt only at the end of each such period of service and that no remuneration or commission was payable to the Managing Agents for broken periods.

(iv) If therefore on the construction of the Managing Agency Agreements it could not be held that S. and Co. Ltd., had created any debt in their favour or had acquired a right to receive the payments from the Companies as at the date of the transfers of the Managing Agencies in favour of the transferees no income could be said to have accrued to them even though they had rendered services as Managing Agents of the Companies for the broken periods. No remuneration or commission could therefore be said to have accrued to them at the dates of the respective transfers.

(v) Since no commission had accrued to S. and Co. Ltd., on the date of the transfer, the commission which was ascertained at the end of the year could not be referred back to the period for which the transferor rendered services to the company: A I R 1950 Bom 171; Income Tax Ref. No. 19 of 1950 (Bom); A I R 1953 S C 527 (530), *Rel. on.*

(vi) All that the transferees obtained under the deeds of assignment and transfer executed by S. & Co. Ltd., in their favour was an income bearing asset consisting of the office of Managing Agents, the Managing Agency Agreement and all the rights and benefits as such Managing Agents under the Agreements and no part of the consideration paid by the transferees to the Sassoons could be allocated as a receipt of

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income by reason of their contribution towards the earning of the commission in the shape of services rendered by them as Managing Agents of the Companies for the broken periods. What the transferees obtained under the deeds of assignment and transfer was the expectancy of earning a commission in the event of the condition precedent by way of complete performance of the obligation of the Managing Agents under the Managing Agency Agreements being fulfilled and a debt arising in favour of the Managing Agents at the end of the stated periods of service contingent on the ascertainment of net profits as a result of the working of the Company during the calendar year. If what was transferred to the respective transferees were merely expectations of earning commission and not any part of the commission actually earned by them or which had accrued to them under the terms of the Managing Agency Agreements, what the transferees received from the Companies under the terms of the Managing Agency Agreements which were thus transferred to them would be their income and no part of such income could ever be said to have accrued to S. and Co., Ltd. during the chargeable accounting period.

(vii) Section 36, T. P. Act which applies in the absence of a contract or local usage to the contrary as between the transferor and the transferee had no room for application as between the subject and the State. The contract to the contrary must be between the transferor and the transferee. Whatever was the contribution of S. and Co., Ltd. towards the earning of the commission during the whole of the calendar year 1943 was the subject matter of the assignment in favour of the transferees and that was sufficient to spell out a contract to the contrary as provided in S. 36 of the Transfer of Property Act.

(viii) Section 26 (2) of the Income-tax Act also had no application. In order to attract the operation of S. 26 (2) the person succeeded must have had an actual share in the income, profits or gains of the previous year and on the construction of the Agreements S. and Co., Ltd. could not be said to have acquired any share in commission for the broken periods.

S. and Co., Ltd. were not therefore taxable for the period during which they worked as managing agents in the chargeable year. A I R 1952 Bom 330, REVERSED.

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Per *Jagannadhadas J.*—The continuous and successive functioning by both the assignor and the assignee under the managing agency agreement was the effective source of the years income. That income accrued on the completion of the year and was the joint income of both the assignor and the assignee. The prior assignments in the course of the year operated as assignments of this future right to a share of the income. It was only by virtue of inter se arrangement between the assignor and the assignee, resulting from the transactions of assignment, that the assignee had the right to collect the entire income. Nevertheless the share in this income which accrued to the assignor on the completion of the year remained the taxable income of the assignor and the assignor was rightly taxed in respect thereof. *E. D. Sasoon and Co., Ltd.* v. *I. T. Commr., Bombay,*

A I R 1954 S C 470.

(1038) *Ss. 4 (1) and 14 (2) (c) — Profits accruing within Indian State.*

A registered firm consisting of two brothers as partners carried on business at Calcutta as bullion merchants. In the course of the accounting year the partners sent bars of silver from Calcutta to Bikaner (which was then an Indian State) where the partners resided, and the value of the bars was credited in the books of the firm. On the assessment of the firm it was alleged that the said silver bars had been sold to the partners for their domestic use but the Income-tax authorities held that the alleged sale was not genuine and that the said silver bars still formed part of the stock in trade of the firm at the close of the previous year and they accordingly included in the taxable profits a sum of Rs. 2,20,887 as the excess arising from the valuation of the said bars at market price on the closing day.

Held, that the source of the profits and gains of a business is indubitably the business, and the place of their accrual is where the business is carried on. As such profits can be correctly ascertained according to the method adopted by an assessee only after bringing into the trading account his closing stock wherever it may exist, the whole of the profits must be taken to accrue or arise at the place of carrying on the business on the finding that the bars of silver lying at Bikaner had not been really sold but remained part of the unsold 'stock

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of the firm's business at the end of the accounting year, the whole of the profits of that year must be taken to have accrued or arisen at Calcutta where the business was carried on, no part of that business having admittedly been transacted at Bikaner and therefore the sum of Rs 2 20 887 was in law assessable to tax. 55 Cal W N 700, Approved, but on different grounds. *Chainrup Sampatram* v. *I, T. Commr.,*

AI R 1953 S C 519
=1953 S C J 655=1954 S C R 211.

(1039) *Ss. 4 (1) (b) (iii) and 14 (2) (c) — Taxable income.*

A company carrying on business in British India, through its managing agents, credited to the latter their commission earned by them on the profits made by the Company. The amount credited included the commission on the profits earned by the company in the Indian States as well. The managing agents claimed exemption in respect of that amount on the ground that the income which had accrued in the states had not been brought into British India and hence was not income which had accrued in British India.

Held, that as the business of the company was carried on in British India and the commission earned by the firm on the profits made by the company in the States arose out of one indivisible agreement to charge a reduced commission on the profits of the company and that as the managing agents had been doing the business of the agency in British India, and not in the States, and there was no suggestion that the managing agents performed any functions in the States, there was no substance in the claim made. *Thiaga Raja Chetty & Co.* v. *I. T. Commr. Madras,,*

A I R 1954 S C 268.

(1040) *S. 4 (1) and (3) (vii)—Insurance amount received by Mills Company against loss of profits owing to fire is taxable income.*

The "total income" mentioned in S. 4, embraces three elements. "income", "profits" and "gains". Though these may overlap in many cases, they are nevertheless separate and severable. Section 4 is so widely worded that everything which is received by a man and goes to swell the credit side of his total account is either an income or a profit or a gain.

An amount of money paid by an insurance Company to the assessee Mills Com-

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pany against loss of profits following a fire is a receipt and in so far as it represents loss of profits, as opposed to loss of capital and so forth, it is an item of income in any normal sense of the term. Such a receipt is inseparably connected with the ownership and conduct of the business and arises from it. Accordingly it being not exempt under S. 4 (3) (vii), the amount is income and as such taxable under S. 4 : 26 Tax Cas 28, *Rel. on.* 59 Ind. App. 206, *Expl.*: 1932 A C. 441 (448), *Ref.*; A. I. R. 1949 Bom. 377, *Affirmed. The Raghuvanshi Mills Ltd., Bombay* v. *The Commr. of Income Tax, Bombay,* **A I R 1953 S C 4.**

(1041) *S. 4A (b) — Hindu undivided family — Residence — Presumption as to —Onus of proof.*

The *karta* of a joint Hindu family domiciled in Ceylon was living with his wife and children in Colombo carrying on a family business there. The family owned immovable properties including the ancestral house in British India He had also shares in two firms situated in British India. In the year of account 1941-42 the *karta* visited British India on seven occasions and the total period of his stay in British India was 101 days. During such stays he personally attended to a litigation relating to family lands and also attended the income-tax proceedings relating to the assessment of the family income. The *karta* who was assessed under S. 4A (b), Income-tax Act, as a 'resident' in British India produced no evidence to show that the control and management of the affairs of the family was situated wholly outside the taxable territories or that the affairs in India were also being controlled from Colombo :

Held, that under S. 4A (b) normally, a Hindu undivided family will be taken to be resident in the taxable territories, but such a presumption will not apply if the case can be brought under the second part of S. 4A (b), i. e., if it is shown that the control and management of its affairs is situated wholly without British India. The word 'affairs' must mean affairs which are relevant for the purpose of Income-tax Act and which have some relation to income. The onus of proving facts which would bring his case within the exception provided by latter part of S. 4A (b) was on the assessee. The period of his stay in British India or the acts done by him in British India, which though not conclusive by themselves to establish the existence of more than one control for the affairs of the family, were by no means irrelevant to the matter in issue and therefore could not be ruled out of consideration in determining it. But the assessee having failed to discharge the onus cast on him the normal presumption must be given effect to and the assessee must be treated as 'resident' in British India under S. 4A (b). *Subbaya Chettiar* v. *I T. Commr.*

A I R 1951 S C 101=1951 S C J 145 =1950 SCR 961.

(1041A) *S. 4 (3) (vii)—"Business of a casual and non-recurring nature" — Public company — Excess amount received by sale of shares— Amount held not taxable.*

The Managing director of the assessee company, entered into an agreement with a sugar company whereby the assessee company was to invest Rs. 5,00,000 in the sugar company in lieu of which it was to be given the managing agency of the third mill of the sugar company — not in existence at the time but expected to be erected in 1933 — when such mill was erected. It was further agreed that if the third mill was not erected then the sugar company was to pay to the assessee company Rs. 15,000 as commission upon the moneys invested by them in shares. There was subsequently a modification to the effect that the assessee company would themselves subscribe to shares worth Rs. 3,00,000 and the remaining shares of Rs. 2,00,000 will be subscribed to by their friends, 3,000 shares of the value of Rs. 3,00,000 were purchased and share certificates duly issued by the sugar company to the assessee company. The third mill was, however, not erected and the agreement about acquiring the managing agency fell through. Thereafter the assessee company decided to sell all the shares. 2,000 shares were first sold and brought an excess amount of Rs. 20,000 over the original cost price. The remaining 1,000 shares were sold in 1943 and they brought in an excess realisation of Rs. 2,26,700. Both these amounts were taxed by the income tax Officer as revenue receipts. The assessee company's contention that the excess was in the nature of capital appreciation was not accepted.

Held that the object of the assessee company in buying shares was purely to obtain the managing agency of the third mill which no doubt would have been an asset of an enduring nature and would have brought them profits but there was from the inception

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no intention whatever on the part of the assessee company to re-sell the shares either at a profit or otherwise deal in them, and that the investment of the money in the purchase of shares was of a capital nature and the profits arising out of the sale of the shares in the circumstances of this case were accretions to capital and were not liable to tax. *Kisan Prasad & Co.* v. *I. T. Commr. Punjab*, **A I R 1955 S C 252.**

(1042) S. 6 — "Business" (Quaere) — Whether managing agency is business? A. I. R. 1937 P. C. 139; A. I. R. 1939 Bom. 283; A. I. R. 1952 All 706, *Rel. on. I. T. Commr.* v. *Thiagaraja*, **A I R 1953 S C 527 = 1954 S C R 258 = 1953 S C J 734.**

(1043) *Ss. 6 (v), 4 (3) (viii) and 2 (1) (a) — Shareholder in Tea Company — Dividend income—Exemption on dividend as agricultural income cannot be claimed.*

Agricultural income as defined in S. 2 (1) (a) is intended to refer to the revenue received by direct association with the land which is used for agricultural purposes and not by indirectly extending it to cases where that revenue or part thereof changes hands either by way of distribution of dividends or otherwise. In fact and truth dividend is derived from the investment made in the shares of the company and the foundation of it rests on the contractual relations between the company and the shareholder. Dividend is not derived by a share-holder by his direct relationship with the land. Hence, even though 40 per cent. of the income of a Tea Company is taxed as income from the manufacture and sale of tea and 60 per cent. of such income is exempt from tax as agricultural income by virtue of Rule 24 of the Income Tax Rules, still the dividend income received by the share-holder in respect of the shares held by her in the said Tea company cannot, to the extent of 60 per cent., be claimed as agricultural income in her hands and therefore 'pro tanto' exempt from tax. A. I. R. 1949 P. C. 1; A. I. R. 1949 P. C. 20 and A. I. R. 1935 P. C. 143, *Rel. on.*; A. I. R. 1953 Bom. 1, Affirmed. *Bacha F. Guzdar* v. *Commr. of I. T. Bombay*, **A I R 1955 S C 74.**

(1044) *S. 9 (1) (iv) — "Capital charge" and "annual charge"—Meaning—Municipal property tax and urban immovable property tax*: A. I. R. (35) 1948 Bom. 72 (2) (F. B), REVERSED; A. I. R. (30) 1943 Bom. 311 and A. I. R. (31) 1944 Mad. 10, *Impliedly* OVERRULED.

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The expression "capital charge" in the clause cannot connote a charge on the capital, that is, the property assessed. It means a charge created for a capital sum, i. e, a charge to secure the discharge of a liability of a capital nature. The words "annual charge" mean a charge to secure an annual liability.

The Municipal property taxes paid under the City of Bombay Municipal Act, 1888, and the urban immovable property taxes paid under the Bombay Finance Act, 1932, are allowable deductions under cl. (iv) as these taxes fall within the ambit of the phrase "annual charge not being a capital charge": A. I. R. (35) 1948 Bom. 72 (2) (F. B.), REVERSED; A. I. R. (32) 1945 All. 147, *Approved*; A. I. R. (30) 1943 Bom. 311 and A. I. R. (31) 1944 Mad. 10, *Impliedly* OVERRULED. *New Piece Goods Bazzar Co.* v. *I. T. Commr.* **A I R 1950 S C 165 = 1950 S C J 437 = 1950 S C R 553.**

(1045) *S. 9 (1) and (2) — House tax and water tax imposed under S. 128, sub-s. (1), cls. (i) and (x) respectively of U. P. Municipalities Act and paid by owner as lessor — Taxes, if should be deducted as allowance from bona fide annual value of property.*

The amount of house tax and the amount of water tax, imposed under S. 128, sub-s. (1), cls. (i) and (x) respectively of the United Provinces Municipalities Act, 1916, and paid by the owner as a lessor under S. 149 of that Act should be deducted as an allowance from the *bona fide* annual value of the property determined under sub-s. (1) read with sub-s. (2) of S. 9, Income-tax Act, on the ground that the amount is an annual charge, which is not a capital charge to which the property is subject within the meaning of cl. (iv) of sub-s. (1) of S. 9 of the Act: A. I. R. (32) 1945 All. 147, *Affirmed. I. T. Commr.* v. *M/s Guppumal Kanhaiya Lal*, **A I R 1951 S C 5 = 1950 S C J 443 = 1950 S C R 563.**

(1046) *S. 10 — Construction of transaction.*

It is well recognised that in revenue cases regard must be had to the substance of the transaction rather than to its mere form, *Kikabhai* v. *I. T. Commr.*, **A I R 1953 S C 509.**

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(1047) *S. 10 (1)—Running business—Withdrawal of assets from stock in trade—Assessability.*

The assessee was a dealer in shares and silver. On 21-1-1942 he withdrew from the business certain shares and silver bars and executed two deeds of trust and on 19-10-1942 he withdrew further shares and silver bars and executad a third deed of trust, appointing himself the managing trustee of all the trusts. The assessee kept his books of account on the mercantile basis and valued the closing stock of his stock in trade at the cost price thereof. The deeds of trust were valued for the purpose of stamp at the market value of the shares and silver bars prevailing at the dates of their execution. But the transfer of these shares and silver bars to the trustees were shown in the books of account at the cost price. The Income-tax Authorities assessed the profit at the difference between the cost price of the said shares and silver bars and the market value thereof at the date of their withdrawal from the business. The question was whether any income arose to the assessee as a result of the transfer of shares and silver bars to the trustees:

Held (per *majority, Bhagwati J.* dissenting) the assessee was right in entering the cost value of the silver and shares at the date of the withdrawal, because it was not a business transaction and by that act the business made no profit or gain, nor did it sustain a loss and the assessee derived no income from it.

(2) that the assessee might have stored up a future advantage for himself by creating the trusts but as the transactions were not business ones and as he derived no immediate pecuniary gain, the State cannot tax them, for under the Income-tax Act the State has no power to tax a potential future advantage. All it can tax is income, profits and gains made in the relevant accounting year. (1950) 30 Tax Cas 209, *Distinguished*; A I R 1939 Cal 559 and 1911-1 Ch 92, *Ref.*

Per *Bhagwati J.*: It does not make the slightest difference whether an asset is realised in the course of the business or is withdrawn from the stock in trade of the business. An asset which has appreciated or depreciated in value as the case may be in accordance with the fluctuations of the market, ceases to be a part of the business, by the one process or the other and hence

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even in the case of withdrawal as in the case of the realisation of the asset, the business is entitled to credit in the goods account the market value of the asset as at the date of its withdrawal whatever be the method adopted by it for valuation of its stock in trade on hand at the close of a year of account. *Obiter*: A I R 1939 Cal 559 is not correctly decided *Kikabhai* v. *I. T. Commr.*, **A I R 1953 S C 509.**

(1048) *Ss. 10 (1), (6) — Turf Club dealing with its members.*

There was an incorporated company authorised to carry on an ordinary business of a race-course company and that of licensed victuallers and refreshment purveyors and in fact was carrying on such a business. The dealings of the company with non-members took place in the ordinary course of business carried on with a view to earning profits as in any other commerical concern. The company gave to its members the same or similar amenities as it gave to non-members, namely, the use of an unreserved seat in a stand, the facility to watch the races, and to bet on the horses in the races, use of the totalisator in that stand and the facility for refreshment. The company received large sums of money on admission tickets from members as well, as from non-members, besides other moneys on other accounts. The company claimed that in computing its total income, the following four items of receipts should be excluded: (1) Season admission tickets from members, (2) Daily admission gate tickets from members, (3) Use of private boxes by members and (4) Income from entries and forfeits received from the members whose horses did not run in the races during the season.

Held, that there was no mutual dealing between the members, 'inter se' and no putting up of a common fund for discharging the common obligations to each other undertaken by the contributors for their mutual benefit. All the four items of receipts from members must be taken into account in computing the total income of the company. The fact that the company had so long enjoyed exemption from taxation was neither here nor there, for there can be no question of acquiring any prescriptive right to exemption from taxation. All the items of receipts from members were received by the company from business with its members within the meaning of S. 10 (1) and none of them was received by the company

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as a trade professional or similar association within the meaning of S. 10 (6). The company was not a "trade association." Case law discussed. Proposition in A I R 1921 Lah 208 held to be widely stated. *I. T. Commr.* v. *R. W. I. Turf Club*,

A I R 1954 S C 85.

(1049) *S. 10 (2) (vi), Proviso — Position before and after amendment in 1939 and 1940 — Assessee company incorporated in United States of America owning Steamships visiting India — Assessment for 1941-42, 1942-43 and 1943-44 — Unabsorbed depreciation at end of 1938-39— Whether can be carried forward in subsequent years.*

A company incorporated in the United States of America owned steamships which visited India. The company's Indian profits which were computed on the basis of "days on round voyage" were assessed to tax under Income-tax Act, as a company through its agents, Messrs. Augus Co. Ltd. In the course of the assessment for the years 1941-42, 1942-43 and 1943-44, the company claimed that its unabsorbed depreciation at the end of 1938-39 should be deemed to be a part of the depreciation allowance for 1939-40 and therefore such unabsorbed depreciation should be allowed to be further carried forward under S. 10 (2) (vi). This claim was negatived by the Income tax Officer, the Appellate Assistant Commissioner of Income-tax and the Income-tax Appellate Tribunal. The Appellate Assistant Commissioner gave two reasons for not giving effect to the contention of the assessee. Firstly, he pointed out that in the course of the assessment for the year 1940-41, the question whether the unabsorbed depreciation remaining at the end of the year 1938-39 could or could not be carried forward and allowed in subsequent years had come up for consideration before the Income-tax Officer but he had decided that it could not be so carried forward. Nevertheless, the company did not appeal against the order and hence the matter could not be reopened in subsequent assessment. Secondly, by reason of the amendment of the section, the respondent-company was not entitled to carry forward the unabsorbed depreciation at the end of 1938-39. The Appellate Tribunal did not accept the first ground but based its decision only on the second ground. At the instance of assessee reference was made to the High Court under S. 66 (1). The High

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Court allowed the claim of the assessee. On appeal by the Income-tax authorities to the Supreme Court:

Held, that the 1st of April, 1940, when the Amending Act came into force, and the 1st of April, 1939, which was the date mentioned in the amended proviso applied not to the accounting year but to the year of assessment because in income-tax matters the law to be applied is the law in force in the assessment year unless otherwise stated or implied. That meant that the old law applied to every assessment year up to and including the assessment year 1939-40:

(ii) that the unabsorbed depreciation which was carried forward from the assessment years 1938-39 into the accounts of the assessment year 1939 40 must be treated as the unabsorbed depreciation in the assessment year 1939-40, for the reason that the profits in that year were not sufficient to absorb this sum, that being the position which would have resulted had the Income-tax Officer not disallowed the sum. In other words, the Court had to accept the position which the accounts would have revealed had the Income-tax Officer not wrongly refused to allow the unabsorbed depreciation of 1938-39 to be carried forward to 1939-40. It followed from this, that according to the mandatory provisions of the old section, the allowance for 1939-40 is not only the percentage allowed for that year but also the unabsorbed depreciation for 1938-39;

(iii) that the amended section applied to the year 1940-41. The assessment year 1939 40 ended on 31st March 1940. It was not an assessment year which ended prior to 1st April 1939. Consequently the unabsorbed depreciation from the year 1939-40 could be carried forward into the accounts of the assessment years 1941-42, 1942 43 and 1943 44 A I R 1952 Cal 148, Affirmed. *I. T. Commr.* v. *L. S. Lines*,

A I R 1953 S C 439.

(1050) *S. 10 (2) (vii), Proviso 2 — "Any such machinery" must be such as were used at least for part of accounting year. A I R 1952 Pat 106, Reversed.*

Under S. 10 tax is payable by an assessee "in respect of the profits or gains of any business, profession or vocation carried on by him." "Business" is defined by S. 2, sub-section (4) as "including any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce

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or manufacture." The fundamental idea underlying each of these words is the continuous exercise of an activity and the same central idea is implicit in the words "carried on by him" occurring in S. 10 (1) and those critical words are an essential constituent of that which is to produce the taxable income. Therefore, the tax is payable only in respect of the profits or gains of the business which is carried on by the assessee. A I R 1932 P C 138 (141), *Rel. on.*

'Any such machinery" or plant in proviso 2 of S. 10 (2) vii) refers to the machinery or plant in respect of which the allowance is to be given under that clause. Indeed, the position has been made clear and placed beyond any doubt by the subsequent amendment of 1946 which added the word "such" in Cl. (vii). The words "used for the purposes of the business" obviously mean used for the purpose of enabling the owner to carry on the business and earn profits in the business. In other words, the machinery or plant must be used for the purpose of that business which is actually carried on and the profits of which are assessable under S. 10 (1). Hence in order to attract the operation of Cls. (v), (vi) and (vii) the machinery and plant must be such as were used, in whatever sense that word is taken, at least for a part of the accounting year. If the machinery and plant have not at all been used at any time during the accounting year no allowance can be claimed under Cl. (vii) in respect of them and the second proviso also does not come into operation

Consquently the second proviso to S. 10 (2) (vii) can have no application to sale of machinery and plant which had not been used for the purpose of business carried on in the accounting year. AIR 1952 Pat 106, Reversed *Liquidators of Pursa Ltd.* v. *I. T. Commr.* **A I R 1954 S C 253 =1954 S C J 294=1954 S C R 767.**

(1051) *S. 10 (2) (v) — Expenditure for the purposes of business — (Trusts Act (1882), Ss. 6, 61 and 81).*

Where the whole scheme of the deed of trust made for the payment of pensions to the staff of the Bank invested the bank or its officers, duly authorised in that behalf, with the sole discretion of granting or of withdrawing, modifying or determining the pension and it was not at all obligatory on them at any time to grant any pension or to continue the same for any period whatever :

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Held (i) that the beneficiaries could not be said to have been indicated with reasonable certainty ;

(ii) that there being no obligation imposed on the trustees, no trust was created even though the moneys had been transferred to the trustees ;

(iii) that for the same reason, there was no power in the nature of a trust which could be exercised by the Court, if the donee of the power for some reason or the other did not exercise the same ;

(iv) that, in the circumstances, the amount paid to the trustees was not an expenditure or an expenditure for the purposes of the business of the Bank within the meaning of S. 10 (2) (xv), Indian Income tax Act. *Allahabad Bank* v. *I. T. Commr.* **AIR 1953 S C 476 =1954 SCR 195=1953 S C J 648.**

(1052) *S. 10 (2) (xv)—Capital Expenditure and Revenue expenditure—Meaning of.*

In cases where the expenditure is made for the initial outlay or for extension of a business or a substantial replacement of the equipment, there is no doubt that it is capital expenditure. A capital asset of the business is either acquired or extended or substantially replaced and that outlay whatever be its source whether it is drawn from the capital or the income of the concern is certainly in the nature of capital expenditure. The question however arises for consideration where expenditure is incurred while the business is going on and is not incurred either for extension of the business or for the substantial replacement of its equipment. Such expenditure can be looked at either from the point of view of what is acquired or from the point of view of what is the source from which the expenditure is incurred. If the expenditure is made for acquiring or bringing into existence an asset or advantage for the enduring benefit of the business it is properly attributable to capital and is of the nature of capital expenditure.

If on the other hand it is made not for the purpose of bringing into existence any such asset or advantage but for running the business or working it with a view to produce the profits it is a revenue expenditure. If any such asset or advantage for the enduring benefit of the business is thus acquired or brought into existence it would be immaterial whether the source of the payment was the capital or income of the con-

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cern or whether the payment was made once and for all or was made periodically. The aim and object of the expenditure would determine the character of the expenditure whether it is a capital expenditure or a revenue expenditure. The source or the manner of the payment would then be of no consequence.

It is only in those cases where this test is of no avail that one may go to the test of fixed or circulating capital and consider whether the expenditure incurred was part of the fixed capital of the business or part of its circulating capital. If it was part of the fixed capital of the business it would be of the nature of capital expenditure and if it was part of its circulating capital it would be of the nature of revenue expenditure. These tests are thus mutually exclusive and have to be applied to the facts of each particular case in the manner above indicated.

In the great diversity of human affairs and the complicated nature of business operations it is difficult to lay down a test which would apply to all situations. One has therefore got to apply these criteria, one after the other from the business point of view and come to the conclusion whether on a fair appreciation of the whole situation the expenditure incurred in a particular case is of the nature of capital expenditure or revenue expenditure in which latter event only it would be a deductible allowance under S. 10 (2) (xv) of the Income-tax Act. The question has all along been considered to be a question of fact to be determined by the Income-tax Authorities on an application of the broad principles laid down above and the Courts of law would not ordinarily interfere with such findings of fact if they have been arrived at on a proper application of those principles. AIR 1947 Lah 162 (FB), *Approved. Case law discussed.*

Whether payment be in a lump sum or instalments, what has got to be looked to is the character of the payment. A lump sum payment can as well be made for liquidating certain recurring claims which are clearly of a revenue nature, and on the other hand payment for purchasing a concern which is prima facie an expenditure of a capital nature may as well be spread over a number of years and yet retain its character as a capital expenditure. A I R 1952 Cal 414, *Approved.*

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The expression "once and for all' is used to denote an expenditure which is made once and for all for procuring an enduring benefit to the business as distinguished from a recurring expenditure in the nature of operational expenses. And by the expression "enduring benefit" is meant enduring in the way that fixed capital endures.

The assessee company acquired from the Government a lease of certain limestone quarries. In addition to the rents and royalties two further sums were payable under the special covenants contained in Cls. 4 and 5 of the lease as "protection fees". Under Cl. 4, the protection was in respect of another group of quarries the lessor undertaking not to grant any lease, permit or prospecting licence regarding the limestone to any other party therein without a condition that no limestone should be used for the manufacture of cement in consideration of a sum of Rs. 5000 payable annually during the whole period of the lease. Under Cl. 5, a further protection was given in respect of the whole of the District, a similar undertaking being given by the lessor in consideration of a sum of Rs. 35,000 payable annually but only for 5 years. In the relevant accounting year the company paid its lessor a sum of Rs. 40,000 in accordance with these two covenants and claimed to deduct the sum in the computation of its business profits under the provisions of S. 10 (2) (xv) :

Held, applying the above tests, that the sum of Rs. 40,000 paid by the assessee was in the nature of capital expenditure and was not an allowable deduction under S. 10 (2) (xv). AIR 1953 Cal 368, *Affirmed. Assam Bengal Cement Company* v. *I. T. Commr. W. B.*, **AIR 1955 S C 89.**

(1053) *S. 10 (2) (xv)—Expenditure incurred for registration of trade marks — Test for determining capital and revenue expenditure — Advantage gained by registration of trade mark — Expenditure whether allowable deduction under S. 10 (2) (xv) — (Trade Marks Act (1940), Ss. 21, 28, 29).*

The test that capital expenditure is a thing that is going to be spent once and for all and income expenditure is a thing that is going to recur evey year is an useful element in arriving at the decision but is not certainly the decisive fact. When an expenditure is made, not only once and for all, but with a view to bringing into existence

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an asset or an advantage for the enduring benefit of a trade, there is a very good reason for treating such an expenditure as properly attributable not to revenue but to capital. (1926) A C 205, *Foll.*

Under the Trade Marks Act, 1940 the proprietor of a trade can have the trade mark registered. Before the Trade Marks Act, the proprietor of a trade mark could maintain an action for infringement of his trade mark and the cause of action in such a case was quite different from the cause of action in an action for passing off goods. By the Trade Marks Act the right of the owner of the trade mark is increased by S. 21, and it is made assignable independently of the goodwill under Ss. 28 and 29. However, by reason of these two incidents the case does not fall within the principle laid down as mentioned above.

Where a sum of money is laid out for the acquisition or the improvement of a fixed capital asset it is attributable to capital but if no alteration is made in the fixed capital asset by the payment, then it is properly attributable to revenue, being in substance a matter of maintenance, the maintenance of the capital structure or the capital asset of the Company. The advantage derived by the owner of the trade mark by registration falls within this class of expenditure. The fact that a trade mark after registration could be separately assigned, and not as a part of the goodwill of the business only, does not also make the expenditure for registration a capital expenditure. That is only an additional and incidental facility given to the owner of the trade mark. It adds nothing to the trade mark itself. (1910) 10 I. T. R. Supp. 1, *Foll.*

A textile mills company carried on business of manufacturing and selling textile goods. For the assessment year 1943-44 and 1944-45, covering the accounting period ending with the calendar years 1941, 1942 and 1943, the company claimed the expenditure incurred by it in registering for the first time its trade marks which were not in use prior to 25-2-1937 as revenue expenditure and an allowable deduction out of its income for the said periods, under S. 10 (2) (xv) Income tax Act.

Held, that the expenditure incurred by the company in registering for the first time its trade marks was not a capital expenditure but was a revenue expenditure and an allowable deduction under S. 10 (2) (xv). A I R (34) 1947 Bom 445. *Approved*, (1942) 2 K B 184, *Disting*, (1949) 17 I T R 595 (Bom) *Affirmed. I.-T. Commr. Bombay* v. *Finlay Mills Ltd.*,

A I R 1951 S C 464=1951 S C J 739 = 1952 S C R 11.

(1054) *Ss. 10 (2) (xv), 66—Conclusion of High Court based on facts not found by Appellate Tribunal — Expenditure for business.*

The jurisdiction of the High Court in the matter of income-tax references is an advisory jurisdiction and under the Act the decision of the Tribunal on facts is final, unless it can be successfully assailed on the ground that there was no evidence for the conclusions on facts recorded by the Tribunal. It is, therefore, the duty of the High Court to start by looking at the facts found by the Tribunal and answer the questions of law on that footing. Any departure from this rule of law will convert the High Court into a fact-finding authority which it is not under the advisory jurisdiction. The statement of the case under the rules framed under the Income-tax Act is prepared with the knowledge of the parties concerned and they have a full opportunity to apply for any addition or deletion from that statement of the case. If they approve of that statement, that is the agreed statement of facts by the parties on which the High Court has to pronounce its judgment.

Where the whole conclusion of the High Court that the assessee campany was entitled to certain deduction under S. 10 (2) (xv) was based on facts not found by the Appellate Tribunal but taken only from the argument of the counsel for the assessee that the payment was made by the assessee company to avoid danger of public exposure and to save itself from scandal and to maintain its managing agency:

Held, that the assessee was not entitled to such deduction: A I R (37) 1950 Cal 270, *Reversed. I. T. Commr.* v. *Calcutta Agency*,

A I R 1951 S C 108 = 1951 S C J 177 = 1950 S C R 1008.

(1055) *S. 10 (7) and Schedule, Rule 2 — Company dealing with business in annuities — Method of determination of its profits.*

It is an error to adopt the figures reached under R. 2 (b) in the Schedule as the

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basis of computing the profits under R. 2 (a) without an independent enquiry into the materials requisite under that rule. Under R. 2, the Income-tax Officer has to determine under cl. (a) what the gross external incomings of the previous year were, and deduct out of them the managing expenses for that year. He has also to find out in terms of Cl. (b) the annual average surplus on the basis of actuarial valuation in the manner prescribed therein. He has then to adopt whichever is higher as the assessable profits of the year, A I R 1953 Cal 299, *Reversed*,

(1055A) *S. 10 (7)—Business of granting pension dependent on human life—Insurance business — (Insurance Act (1938), S. 2 (11).*

The business of a company consisting exclusively in granting terminable pensions or annuities dependent on human life in favour of the subscribers or their nominees is insurance business as defined in S. 2 (11) of the Insurance Act. The profits of such a business should therefore be computed in accordance with R. 2 in the Schedule to the Income-tax Act (Point conceded). *G. F. Pension Fund* v. *Commr. of I. T. West Bengal*, **A I R 1955 S C 50.**

(1056) *S. 10 — Profits realised on sale of investments.*

In order to determine whether the surplus arising out of sale of investments is a capital receipt on a trading profit, the test is whether the sales which produced the surplus were so connected with the carrying on of the assessee's business that it could fairly be said that the surplus is the profits and gains of such business. It is not necessary that the surplus should have resulted from such a course of dealing in securities as by itself would amount to the carrying on of a business of buying and selling securities. It would be enough if such sales were effected in the usual course of carrying on the business or, if the realisation of securities is a normal step in carrying on the assessee's business.

The assessee, a private limited company, had the following as one of its objects in the memorandum of association:

To carry on and undertake any business, transaction, operation or work commonly carried on or undertaken by bankers, capitalists, promoters, financiers, concessionaires, contractors, merchants, managers, managing agents, secretaries and treasurers.

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To purchase or otherwise acquire, and to sell . . . stock, share . . . business concerns and undertakings.

To invest and deal with the money of the company not immediately required for the company's business upon such securities and in such manner as may from time to time be determined."

The company held a large number of shares in other incorporated companies and was realising some of its holdings and acquiring large blocks of shares in other companies. In the return for the assessment year 1938-39, the company showed a loss as a result of the sales of shares and securities during the previous year and this was allowed as a business loss in the computation of its profits. In the assessment for the years 1939-40, 1940-41 and 1941-42, however, the company claimed that the surplus resulting from similar sales during the corresponding account years was not taxable income as such surpluses resulted from a mere change of investments and was, therefore, a capital gain.

Held on the facts found in regard to the nature and the course of the company's business and agreeing with the High Court and the Appellate Tribunal that the realization of the profits on investment was directly referable to the carrying on of the company business as financiers and was taxable. A I R 1940 P C 230, *Applied*. A I R 1951 Cal 349, *Affirmed*. *Sardar Inder Singh* v. *I. T. Commr.*

A I R 1953 S C 453=1954 S C R 167 = 1953 S C J 628.

(1057) *S. 10 (2) (xi)—Bad debt—Assessee, manager of joint Hindu family, carrying on money-lending business prior to 1931, in partnership with K - Business discontinued except for realisation of outstandings from P—Decree against P in 1940—In execution, lands of P sold—Sum due on decree divided between assessee and K—Assessee entering half of said sum in books of his own separate money-lending business carried on as manager of family —Assessee writing off sum which was still due from P — Sum held admissible deduction.*

The assessee was the manager of a Hindu undivided family. Prior to 1931, he was carrying on a money-lending business in partnership with one K. The business of this partnership was discontinued except

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for the purpose of realisation of outstandings due to it. One of the outstanding was a debt due from the firm of K on a mortgage. A final decree was obtained against the said firm in the year 1940. In execution of that decree certain lands of the debtor were sold. On 11-9-1942, a certain sum was due under the decree when the two partners decided to close the accounts of the partnership and in pursuance of that decision the outstandings were divided between them. On 12-9-1942, the assessee entered a sum representing half of the said sum due from the debtor under the decree, in the books of his own separate money-lending business which he was carrying on as manager of the family. A separate account was opened in these books in the name of the debtor. There were certain money receipts towards the discharge of the debt during the accounting period 1943-44. The total amount realised subsequent to 12-9-1942 came to Rs. 4,664 and the assessee credited half of this amount, i. e., Rs. 2,332, in his account as his share. On 5-10-1943, the assessee wrote off the sum of Rs. 5,880 which was still due to him from the debtor out of the amount of Rs. 8,197, as irrecoverable. In the assessment year 1944-45 (accounting year 1943-44), the assessee claimed an allowance of the aforesaid sum of Rs. 5,880 as a bad debt under S. 10 (2) (xi) of the Act. The claim was disallowed by the Income-tax Officer The High Court allowed the claim of the assessee. The only point to be decided on appeal to the Supreme Court was whether, on the facts and in the circumstances under which the sum of Rs. 8197 was dealt with by the assessee it was a permissible deduction from his income under S. 10 (2) (xi) in the assessment year.

Held that where a division was made between the partners on 12-9-1942, the books of the partnership were closed, an account of the debtor was opened in the family books and he was debited with the amount of 8197 indicating that he became a debtor of the new partnership of the business and the debt became a loan advanced by the assessee's money lending business to the debtor. The sum of Rs. 5880 written off as irrecoverable was therefore, an admissible deduction under S. 10 (2) (xi). *L. S. Raju* v. *State of Mysore*,

A I R 1952 S C 435.

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(1058) *S. 10 (2) (XV) — Expenditure for business—Legal charges.*

Expenses incurred by a person in defending himself against a criminal prosecution, even if it arises out of his business or professional activities, cannot be allowed to be deducted in the assessment of his profits or gains for income-tax purposes. Though such expenses are not to be regarded as the personal expenses of the assessee, it cannot be said that they constitute "expenditure laid out wholly or exclusively for the purposes of the business" as there is always the fear of possible fine or imprisonment of the person in such cases and the defending against the same cannot easily be dissociated from the object of defending the matter to protect the good name of the business or of his profession.

No distinction can be drawn for the purpose of assessment between the legal expenses of the unsuccessful and successful defence in criminal cases: A I R 1950 Bom 297, *Doubted*; A I R 1942 PC 11, *Disting. I. T. Commr.* v. *H. Hirajee*,

A I R 1953 S C 324
=1953 S C R 714=1953 S C J 448.

(1059) *S. 12 (2)—Expenditure incurred solely for 'gains'—Principles of decision—Held that the expenditure could be deducted under S. 12 (2).*

On the true construction of S. 12 (2) the decision of the question whether a particular expenditure is incurred solely for the purpose stated in the sub-section rests on the following principles:

(a) Though the question must be decided on the facts of each case, the final conclusion is one of law. A I R (24) 1937 P C 189 and A I R (24) 1937 P C 139, *Ref.*

(b) It is not necessary to show that the expenditure was a profitable one or that in fact any profit was earned, (1906) 6 Tax Cases 501 and 1915 A C 433, *Ref.*

(c) It is enough to show that the money was expended not of necessity and with a view to a direct and immediate benefit to the trade but voluntarily and on the ground of commercial expediency and in order indirectly to facilitate the carrying on of the business.' 1926 A C 205 *Ref.*

An Investment company was formed originally for acquiring, holding and otherwise dealing with the shares and Govt. securities held by one A. On A's death B was appointed Administrator of A's Estate in India and

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held in that capacity 50,000 shares belonging to A. Subsequently as the executors of A required money, B entered into an agreement with the company whereby the company agreed to reduce its capital by 50 lakhs and for that purpose took over the shares from B issuing to B debentures of the face value of 50 lakhs carrying interest at the rate of 5 P. C. P. A. redeemable at the option of the registered holder at any time. The question was whether the 5 per cent interest paid to B on these debentures by the Company could be deducted from its income u/s 12 (2) I. T. Act.

Held (1) that the transaction was voluntarily entered into in order indirectly to facilitate the carrying on of the business of the Company and was made on the ground of commercial expediency. It therefore fell within the purview of S. 12 (2).

(2) That it being an investment company if it borrowed money and utilised the same for its investments on which it earned income, the interest paid by it on the loans would clearly be a permissible deduction under S. 12 (2), Income Tax Act. Whether the loan is taken on an over draft, or is a fixed deposit or on a debenture makes no difference in law. The only argument urged against allowing this deduction that the person who took the debentures was the party who sold the ordinary shares is not sound; 1912 A. C. 118 *Rel. on. Eastern Investment Ltd.* v. *Commr. of Income-tax, West Bengal,*

A I R 1951 S C 278
=1951 S C R 594=1951 S C J 420.

(1060) *S. 13—Applicability.*

Section 13 will apply to cases both under Ss. 10 and 12. *I. T. Commr.* v. *Thiagaraja,*

A I R 1953 S C 527
=1954 S C R 258=1953 S C J 734.

(1061) *S. 13 — Powers of Income-tax Officer.*

Though there is evidence that the assessee followed the mercantile system of accountancy, still the Income-tax Officer has full authority under the proviso to S 13 to compute the profits upon such basis and in such manner as he thought fit. *I. T. Commr.* v. *Thiagaraja,*

A I R 1953 S C 527=1954 S C R 258=1953 S C J 734.

(1062) *S. 13 — Mercantile basis or cash basis.*

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The assessees, who were managing agents for a company, kept no separate books of accounts other than the books of accounts of the company in which there was a ledger containing entries relating to the remuneration and commission paid in cash to them. The sum of Rs. 2,26,850-5-0 was debited as a revenue expenditure of the company as having been paid to the assessees in the books of accounts of the company kept by the assessees and was also allowed as a deduction in computing the profits and gains of the company for the purposes of income-tax for 1941-1942.

Held that the fact that certain moneys were drawn in cash by the assessees from time to time did not necessarily lead to the inference that the assessees kept their accounts on a cash basis. Anyone familiar with commercial transactions knows that even in accounts kept on a mercantile basis there can be entries of cash credits and debits. A I R 1933 P C 108, distinguished. *I. T. Commr.* v. *Thiagaraja,*

A I R 1953 S C 527
=1954 S C R 258
=1953 S C J 734.

(1063) *S. 13 — Applicability to non-resident.*

Section 13 would hardly be relevant where stray items of income are caught in taxable territories as received in taxable territories by a non-resident. *Keshav Mills Limited* v. *I. T. Commr,*

A I R 1953 S C 187
=1953 S C R 950
=1953 S C J 243.

(1064) *S. 13—Method of accounting.*

Mercantile system of accounting and cash system explained. *Keshav Mills Limited* v. *I. T. Commr.* **A I R 1953 S C 187 =1953 S C R 950=1953 S C J 243.**

(1065) *S. 16 (1) (c) — Hindu undivided family property — Trust deed by father and son — Power of revocation to father— Death of father — Son enjoying income from trust property—It cannot be included in income of joint family.*

There was a Hindu undivided family consisting of (1) R, (2) his son N, (3) R's wife, (4) N's wife and (5) R's unmarried daughter. On the 27th July 1933, R and N who were the sole coparceners, executed a trust deed in respect of four items of house property belonging to the joint family, which owned at the time and continued to own other properties also. The effect of the trust deed was

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that the income of the property settled on trust was to be enjoyed by R during his lifetime, and that after his death the said income was to be enjoyed by N alone, with a right of residence provided in favour of his mother, in a part of one of the houses comprised in the trust deed. After the death of N, the income was to be enjoyed by his wife and the natural born sons in existence at the time of the death of the survivor of R and N. There was an express power of revocation of the trust deed reserved to the said R by a specific clause therein. But R died and thereafter the income of the property was enjoyed by N. In assessing the joint family to income-tax, the question arose whether the income of the trust property could be included in the income of the assessee (joint Hindu family) under S. 16 (1) (c).

Held that the income of the trust property could not be included in the income of the assessee undivided family. *I. T. Commr.* v. *Rati Lal*, **A I R 1954 S C 503.**

(1066) Ss 23, 27, 31 and 66 — Matter again coming before Income-tax Officer from Appellate Tribunal — Function of Income-tax Officer is only to carry out directions of of Tribunal—He cannot re-open assessment already made by him under S. 23 — In carrying out directions, he cannot be regarded as having acted under S. 23 or S. 27 — Order passed by Income-tax Officer is not appealable under S. 30 (1)—Application to Appellate Assistant Tribunal against order is not an appeal — Order on application is not one under S. 31 (3) and, therefore, no further appeal lies to Appellate Tribunal under S. 33 (1) so as to enable Appellate Tribunal to make order under S. 33 (4)—In such case no question of law can arise to be referred under S. 66 (1) or (2). *I. T. Commr.* v. *Arunachalam Chettiar*,

A I R 1953 S C 118
=1953 S C R 486
=1953 S C J 115.

(1067) *S. 23 (3) — Powers of Income-tax Officer — Limits of — Estimate of gross profit rate based on pure guess and suspicion—Powers under Art. 136 exercised — (Constitution of India, Art. 136).*

Though the Income-tax Officer is not fettered by technical rules of evidence and pleadings & is entitled to act on material which may not be accepted as evidence in a court of law, it is equally clear that in making the assessment under sub-s. (3) of S. 23 of the Act, the Income-tax Officer is

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not entitled to make a pure guess and make an assessment without reference to any evidence or any material at all. There must be something more than bare suspicion to support the assessment under S. 23 (3). AIR 1944 Lah. 353 (2) (F B) Ref. *Dhakeshwari Cotton Mills* v. *I. T. Commr. W. B.*,

A I R 1955 S C 65.

(1068) *Ss. 25, 3, 26, 48 and 55 — Succession — Change in the constitution of firm—(Partnership Act (1932), Ss. 4 and 40).*

Section 25 does not regard a mere change in the personnel of the partners as amounting to succession and disregards such a change. It follows therefrom that a mere change in the constitution of the partnership does not necessarily bring into existence a new assessable unit or a distinct assessable entity and in such a case there is no devolution of the business as a whole.

It is true that under the law of partnership a firm has no legal existence apart from its partners and it is merely a compendious name to describe its partners but it is also equally true that under that law there is no dissolution of the firm by the mere incoming or outgoing of partners. A partner can retire with the consent of the other partners and a person can be introduced in the partnership by the consent of the other partners. The reconstituted firm can carry on its business in the same firm's name till dissolution. The law with respect to retiring partners as enacted in the Partnership Act is to a certain extent a compromise between the strict doctrine of English Common Law which refuses to see anything in the firm but a collective name for individuals carrying on business in partnership and the mercantile usage which recognizes the firm as a distinct person or quasi corporation. But under the Income tax Act the position is somewhat different. A firm can be charged as a distinct assessable entity as distinct from its partners who can also be assessed individually. Provisions of Ss. 26, 48 and 55 also go to show that the technical view of the nature of a partnership under English law or Indian law, cannot be taken in applying the law of income-tax. *I. T. Commr*, v. *A. W. Figgs & Co.*,

A I R 1953 S C 455
=1953 S C J 635.

(1069) *S. 23 (3)—Powers of Income-tax Officer — Limits of — Estimate of gross*

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profits based on pure guess and suspicion — Power under Art. 136 exercised—(Constitution of India, Art. 136).

Though the Income-tax Officer is not fettered by technical rules of evidence and pleadings, and is entitled to act on material which may not be accepted as evidence in a Court of law, it is equally clear that in making the assessment under sub-section (3) of S. 23 of the Act, the Income-tax Officer is not entitled to make a pure guess and make an assessment without reference to any evidence or any material at all. There must be something more than bare suspicion to support the assessment under S. 23 (3). A I R 1955 S C 65, Foll.

Held on facts that both the Income-tax Officer and the Tribunal in estimating the gross profit rate on sales did not act on any material but acted on pure guess and suspicion and it was thus a fit case for the exercise of the power under Art. 136. *Dhakeswari Cotton Mills* v. *I. T. Commr., W. B.*,

A I R 1955 S C 154.

(1070) *Ss. 24 (2), 34 — Set-off of loss.*

Before any question of set-off of loss can arise, there must be, (1) a loss under one or more of the heads mentioned in S. 6 and (2) an income, profit or gain under some other head. It follows that when there is no income under any head at all, there is nothing against which the loss can be set off in that year and unless that can be done sub-s. (2) does not come into play.

Secondly, a set-off under S. 24 (1) can only be claimed when the loss arises under one head and the profit against which it is sought to be set off arises under a different head. Where the loss is computed by striking a balance in the profit and loss account of just the one business no question of different heads arises. Unless the loss can be set off under sub s. (1) of S. 24, it cannot be carried forward under sub-s. (2) and if it cannot be carried forward the question of its determination and computation becomes irrelevant: A I R 1936 P C 133, Ref.

Where therefore an assessee company files a nil return not disclosing any income, profit and gains and in a subsequent proceedings under S. 34 shows certain loss on its total world income, the assessee cannot claim in the latter proceedings that the loss should be determined and recorded ; A I R

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1950 Mad 647, affirmed. *Anglo-French Textile Co.* v. *I. T. Commr. Madras,*

A. I. R. 1953 S C 111
=1953 S C R 448
=1953 S C J 101.

(1071) *S. 25 (1), (3) and (4) (as amended in 1939) — Construction.*

Sub-section (1) of S. 25 is an exception to the general rule laid down in the charging S. 3 of the Act. Sub-sections (3) and (4) of S. 25 are not in pari materia with sub-s. (1). They are in the nature of substantive provisions intended to give relief from tax charged in certain cases. The mere circumstance of their being grouped together with sub-s. (1) in S. 25 cannot lead to the conclusion that the provisions therein contained are of the same nature and character as the provisions contained in sub-s. (1). Opinion of Satyanarayana Rao J. in A. I. R. 1950 Mad. 671, not approved. *I. T. Commr.* v. *K. Sirinivasan,* **A I R 1953 S C 113 = 1953 S C R 486=1953 S C J 115.**

(1072) *S. 25 (3) and (4) — "Previous year" — Interpretation.*

The expression "end of the previous year" in sub-ss. (3) and (4) of S. 25 in the context of those sub-sections means the end of an accounting year (a period of full 12 months) expiring immediately preceding the date of discontinuance or succession. Therefore, when the profits of the year of succession fall to be assessed under S. 25 (4) the predecessor of a business can claim exemption from liability to pay tax on the profit earned from the end of the previous year to the date of succession, the "previous year" here meaning the completed accounting year immediately preceding the date of succession.

Where a partnership firm, charged to income-tax under the Income-tax Act, 1918, transferred, on 1-3-1940, its business as a going concern to a private limited company and for the assessment year 1940-41 claimed that the firm was not liable to pay any income-tax on the income of its business from the end of the accounting year ending 30-6-1938 to 29-2-1940, the date on which the limited company succeeded to the business of the firm (i. e., for a period of 20 months) under S. 25 (4) :

Held on a true construction of S. 25 (4) that the period the profits of which were entitled to exemption from the payment of

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the tax was the period between 1.7.1939 to 29.2.1940, that is, a period of eight months only and not a period of 20 months as claimed. Opinion of Vishwanatha Sastri J. in A I R 1950 Mad 671, *Affirmed. I. T. Commr.* v. *K. Sirinivasan*,

A I R 1953 S C 113
=1953 S C R 486
=1953 SC J 115.

(1073) *Ss. 25 (4) and 26 (2) (as amended in 1939) — Power to make accelerated assessment.*

On a plain reading of Ss. 25 (4) and 26 (2) together, it is clear that the Income-tax Officer is not empowered to make an accelerated assessment in the year in which succession occurs on the profits of that year, and prematurely assess the person succeeding to a business so that he may be able to give relief to the person succeeded. The exemption provided for in S. 25 (4), and the apportionment mentioned in S. 26 (2), have to be made in the assessment year in which the profits of the year of succession fall to be assessed under S. 3 of the Act. *I. T. Commr.* v. *K. Sirinivasan*,

A I R 1953 S C 113
=1953 S C R 486
=1953 S C J 115.

(1074) *Ss. 25 (4) and 26 (2)—'Succeeded in such capacity,' meaning of — Executors to carry on business of testator as going concern for one year and then to sell it — Date of succession.*

A testator died on 9.4.1942 leaving a will of which probate was obtained by the executors. The will directed the executors to carry on the business of the testator as a going concern after his death for a period not exceeding 12 months and then to sell it to one of the testator's nephews and failing them to an outsider. The executors sold the business to one of the nephews on 1.1.1943 after carrying it on till that date. The question was what was the date of succession for purposes of S. 25 (4), Income-tax Act :

Held, that as on the day of the death of the testator the estate including the business got vested in the executors and the executors carried on the business within the meaning of S. 3 read with S. 10 of the Act they became personally liable as assessees and therefore 'a succession in such capacity' took place within the meaning of S. 25 (4) on that date, i. e., 9.4.1942: AIR (35) 1948 Bom 391, *Affirmed.*

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Dicta (Per *Patanjali Sastri J.*) — Section 25 (4) is wide enough to include in its scope cases of succession on death.

Though a transfer of ownership is ordinarily involved in cases of succession falling within S. 26 (2) or S. 25 (4), it cannot be regarded as an essential element of succession within the meaning of those provisions.

The words "in such capacity" in Ss. 25 (4) and 26 (2) mean nothing more than the capacity of a person who carries on the business as the predecessor was carrying it on, that is, with liability to be taxed on its profits and gains. *Executors of Dubash* v. *I.-T. Commr.*,

A I R 1951 S C 111
=1951 S C J 165
=1950 S C R 969.

(1075) *Ss. 25A & 34 — Assessment of joint Hindu family—Partition of family —Re-assessment—Notice under S. 34 sent to Karta—Notice is valid — No notice on individual members is necessary — Submission of return and assessment — Procedure indicated.*

A joint Hindu family of which *A* was the karta, was assessed to income-tax for the year 1939-40. In 1944, the Income-tax Officer considered that certain income of the family taxable in 1939-40 had escaped assessment. In the meanwhile, the joint family had become divided and necessary steps had been taken by the members to have an order passed under S. 25A (1). The income-tax officer issued a notice in the name of the joint Hindu family and served it on *A* under S. 34 read with S. 22 to make a return in respect of the escaped income and *A* sent a return in response to that notice. Thereafter, the Income-tax Officer made an assessment on the escaped income and issued a notice of demand on *A* as the karta and on the two other members of the joint family requiring payment of the full amount of tax due on the escaped income and without apportioning the liability for it amongst the three members of the family. A contended that the proceedings were irregular and that he was not liable to pay anything. His contention was rejected by the income-tax Officer, the Appellate Assistant Commissioner, and the Income-tax Appellate Tribunal. On reference, the High Court expressed the view that there were irregularities both in initiating the proceedings and in completing the same but as there wae no prejudice to *A*

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they decided the question referred against *A*. On appeal to the Supreme Court by *A* :

Held (i) that the proceedings were validly initiated, since the Income-tax Officer was assessing income of the Hindu undivided family as in 1939-40. When proceedings were initiated under S. 34 read with S. 22 it was not necessary to issue notice to every member of the family.

(ii) that on a true construction of S. 25A (1), the Income-tax Officer in the first place had to make an assessment of the total income as if no partition had taken place. That meant that he had to find out what the total income was and calculate the amount of tax payable thereon as if it was payable by one unit. Having done that, it was the duty of the Income-tax Officer under the section to apportion the amount payable by the unit amongst the members of the joint family according to the portion of the joint family property allotted to each of them.

(iii) that since the Income-tax Officer had omitted to make any apportionment, it was necessary for the Income-tax Officer to issue the notice of demand against each of the members of the family in accordance with the concluding words of S. 25A (2), and that should be done.

(iv) that the argument that it was only on the failure or default of payment by one of the members that the Government had the right to recover that portion of the amount from others could not be accepted. If the Legislature wanted to give power to the income-tax authority to recover from others only on failure of payment by a party, it would have said so expressly. There is absence of similar words in the proviso to S. 25A (2). *Lakshmi Narayan* v. *I. T. Commr., B. & O.*,

A I R 1953 S C 429.

(1076) Sections 30 (1), 31, 28, 33 (4), 66 (1) and (2)—Assistant Commissioner wrongly declining to admit appeal — It amounts to refusal to exercise jurisdiction vested in him —Such order founded on an error as to jurisdiction can be corrected by appropriate proceedings but is not such an order as is contemplated by any of sub-sections of S. 31 or S. 28 — No appeal lies under S. 33 (1) and hence no order under S. 33 (4) can be made by Appellate Tribunal — In the absence of such order, there can be no reference under S. 66 (1) or S. 66 (2). *I. T. Commr.* v. *Arunachalam Chettiar*,

A I R1953 S C 118 =1953 S C J 115=1953 S C R 486.

(1077) Section 31 — Appellate Assistant Commissioner can exercise jurisdiction and make order under S. 31, only when there is an appeal as contemplated by S. 30. *I. T. Commr.* v. *Arunachalam Chettiar*,

A I R 1953 S C 118 1953 S C J 115=1953 S C R 486.

(1078) Sections 33 (4) and 66 (1) — No appeal but miscellaneous application before Appellate Tribunal — Application entertained under inherent powers— Order upon such application is not one under S. 33 (4) — There can, therefore, be no reference under S. 66 (1) or S 66 (2). *I. T. Commr.* v. *Arunachalam Chettiar*, **A I R 1953 S C 118 =1953 S C J 115=1953 S C R 486.**

(1079) Section 33 (4) — Order under, can be made only on appeal from order passed by Appellate Assistant Commissioner under S. 28 or S. 31. *I. T. Commr.* v. *Arunachalam Chettiar*,

A I R 1953 S C 118 =1953 S C J 115=1953 S C R 486.

(1080) Section 34 — Proceedings taken under — Whether assessee is entitled to reopen whole proceedings. (Quaere)) *Anglo-French Textile Co.* v. *I. T. Commr. Madras*, **A I R 1953 S C 111 =1953 S C J 101=1953 S C R 448.**

(1081) *S. 34 (1-A) (as inserted by Act 33 of 1954)—Object of enacting sub-section (1-A) is removal of defects contained in Taxation on Income (Investigation Commission) Act (30 of 1947), S. 5 (1).*

The classification made in Section 5 (1) of Act 30 of 1947 was bad because the word "substantial" used therein was a word which had no fixed meaning and was an unsatisfactory medium for carrying the idea of some ascertainable proportion of the whole, and thus the classification being vague and uncertain, did not save the enactment from the mischief of Article 14 of the Constitution. This defect stands cured in Section 34 of the Income-tax Act, as amended by Act 33 of 1954 inasmuch as the Legislature has clearly indicated in the statute what it means when it says that the object of the Act is to catch persons who to a substantial extent had evaded payment of tax, in other words, what was seemingly indefinite within the meaning of the word "substantial" has been made definite and clear by enacting that

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no evasion below a sum of one lakh is within the meaning of that expression. Again, the classification of Section 5 (1) was criticized on the ground that it did not necessarily deal with persons who during the period of war had made huge profits and evaded payment of tax on them. The amendment made in Section 34 has remedied this defect also. The amended section clearly states that the amended section will operate on income made between the 1st September, 1939, and the 31st March 1946 and tax on which has been evaded. It is thus clear that the new sub-section (1-A) inserted in section 34 by the provisions of Act 33 of 1954 is intended to deal with the class of persons who were said to have been classified for special treatment by Section 5 (1) of Act 30 of 1947. *Meenakshi Mills* v. *Visvanatha Sastri*,

A I R 1955 S C 13.

(1082) *S. 37 — Proceedings under, are judicial proceedings—(Words and phrases —Judicial proceedings).*

Under the provisions of S. 37, the proceedings before the Income-tax Officer are judicial proceedings and all the incidents of such judicial proceedings have to be observed before the result is arrived at. The assessee would have a right to inspect the record and all relevant documents before he is called upon to lead evidence in rebuttal in proceedings under S. 34 of the Act. *Mohta & Co.* v. *Visvanatha Sastri*,

A I R 1954 S C 544.

(1083) *S. 42—Scope.*

Section 42 only speaks of deemed income. The whole object of that section is to make certain income, profits and gains to be deemed to arise in India so as to bring them to charge. The receipt of the income, profits and gains being one of the tests of liability, where the income, profits and gains are actually received in India it is no longer necessary for the revenue authorities to have recourse to the fiction: 1946-14 I T R 417 (All); A I R 1949 Mad 610 and A I R 1931 P C 165, *Rel. on. Turner Morrison & Co.* v. *I.-T. Commr.* **A I R 1953 S C 140 =1953 S C R 520=1953 S C J 181.**

(1084) *S. 42 — "Operation" and 'business connection.'*

In a case where all that may be known is that a few transactions of purchase of raw materials have taken place in British India, it cannot ordinarily be said that the isolated acts were in their nature "operations" within the meaning of that expression. But where the raw materials were purchased by a foreign company doing business outside British India systematically and habitually through an established agency in British India having special skill and competency in selecting the goods to be purchased and fixing the time and place of purchase, such activity is well within the import of the term "operation" as used in S. 42 (3) of the Act: A I R 1951 Mad 361 and A I R 1950 S C 134, *Rel. on.*

In such a case, where there was a regular agency established in British India for the purchase of the entire raw material required by a foreign company (assessee) for manufacture abroad and the agent was chosen by reason of his skill, reputation and experience in the line of trade the foreign company (assessee) can be said to have a business connection with the agency, within the meaning of S. 42.

An isolated transaction between a non-resident and a resident in British India without any course of dealings such as might fairly be described as a business connection does not attract the application of S. 42, but when there is a continuity of business relationship between the person in British India who helps to make the profits and the person outside British India who receives or realizes the profits, such relationship does not constitute a business connection. *Anglo-French Textile Company* v. *I.-T. Commr.*, **A I R 1953 S C 105 =1953 S C R 454=1953 S C J 91.**

(1085) *S. 42 (1)—Applicability to resident assessee — Income from business connection in Mysore State—Assessability.*

In view of the legislative changes in Ss. 4, 14 and 42 of the Act, the conclusion is irresistible that the object of recasting S. 42 (1) in general terms was to make the definition of "deemed income" given in the section generally applicable to all classes of assessees. The sub-section has been drafted in the widest terms and there is nothing whatsoever in its language to suggest that its operation is confined to non-residents only. Wherever the legislature intended to limit the operation of any part of this section to non-residents alone, it said so in express terms. Sub-section (2) and the latter portion of sub-s. (1) expressly concern themselves with the case of non-residents while sub-ss. (1) and (3) are so framed that

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they cover both residents and non-residents.

Further, the only purpose in deleting the words "any person residing out of British India" from S. 42 (1) as it stood before 1939 is to bring residents within the ambit of the section. There is no reason whatsoever for not giving to the plain words of the section the meaning that on the face of it they bear.

An assessee carried on business in Bombay, Madras and Mysore State. During the accounting year, the Mysore branch purchased goods from the Bombay head office and the Madras branch of the value of Rs. 2,45,455. The Income-tax Officer, estimated these purchases of the Mysore branch in British India at Rs. 3,00,000 and its profits at Rs. 75,000 on the sale of these goods in Mysore. It was contended that the assessee being a person resident in India S. 42 could not be invoked in the case, because that section applied only to cases of non-residents :

Held that the circumstances of the case S. 42 (1) applied and half of the profits on the sale of goods in the Mysore State should be deemed to accrue or arise in British India : A I R 1946 Bom 185 : 1945-13 ITR 405, *Overruled* ; A I R 1950 S C 134, *Rel. on* ; A I R 1950 Cal 551 and A I R 1950 Mad 631, *Ref. I.-T. Commr.* v. *Bhogilal Laherchand*, **A I R 1954 S C 155 =1954 S C R 444=1954 S C J 122.**

(1086) *Ss. 43, 42 and 40—Section 43 does not always attract S. 42.*

The portion of S. 43 which refers to the person through whom the non-resident is in respect of any income, profits or gains does not necessarily attract the provisions of S. 42, for the income, profits and gains received by the person who is treated as agent under S. 43 may not fall within any of the several categories of income, profits or gains referred to in S. 42. The language of S. 43 will also attract the provision of S. 40, for that section also contemplates a person who is entitled to receive on behalf of the non-resident any income, profits and gains chargeable under this Act and may even attract the provisions of S. 4 (1) (a). Thus, there is no warrant for the contention that an appointment of a person as a statutory agent under S. 43 only attracts S. 42 for such appointment is for all purposes of the Act and not only for the purpose of S. 42. *Turner Morrison & Co.* v. *I. T. Commr.* **A I R 1953 S C 140 =1953 S C R 520 =1953 S C J 181.**

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(1087) *S. 43—Agent, an animated post office.*

Where a Company in India is entrusted with important duties on behalf of an Association in Egypt, namely, selling of the goods consigned to the Company for sale, handling the cargoes, issuing delivery orders, collecting the sale proceeds and then to remit the same after deducting the expenses incurred by it and its own expenses, in other words, where the functions of the Company far transcend the mere mechanical act of transmitting the sums collected by it to the Association in Egypt, the description of "an animated Post Office" can hardly apply to an agent of this description: A. I. R. 1931 P. C. 165, *Rel. on. Turner Morrison & Co.* v. *I. T. Commr.* **A I R 1953 S C 140 =1953 S C R 520 =1953 S C J 181.**

(1088) *Ss. 51, 52, 53—Applicability—(Criminal P. C. (1898), S. 227—Alteration of charge).*

Held that even if it be assumed that the assessee was not liable to be prosecuted under S. 52 because of the verification being made by his agent and not by himself, as there was no return by him under S. 22, Income-tax Act, his liability under S. 51(c) for failing without reasonable cause or excuse to furnish in due time any of the returns mentioned in S. 22, sub-s. (2), would nevertheless remain unaffected. Whether his liability arose under S. 51 for failure to furnish the return as required by S. 51 (c) or for making a false statement in the return as contemplated by S. 52, it made no difference to the authority of the Assistant Commissioner to permit the composition of the offence under S. 53. That section covers both the offences under Ss. 51 and 52. There could be no doubt therefore that the assessee could be prosecuted either under S. 51 (c) or S. 52 and even if he had been prosecuted by the Income-tax authorities under S. 52 only, there was nothing to prevent the Court from altering the charge to one under S. 51 (c) if it thought fit. *Sham Rao* v. *Dominion of India.* **A I R 1955 S C 249.**

(1089) *S. 53 (2) — Compounding of offence.*

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What S. 53 provides is that a person shall not be proceeded against for an offence under S. 51 or S. 52 except at the instance of the Inspecting Assistant Commissioner and that the lastmentioned officer may, before or after the institution of proceedings, compound any such offence. The section does not say that the offence can only be compounded if it is proved to have been actually committed. If there is a proceeding on a charge under S. 51 or S. 52, it comes within the purview of S. 53 and compounding of the offence will be quite within the section. *Sham Rao* v. *Dominion of India.*

A I R 1955 S C 249.

(1090) *S. 66—Question of law—Decision on question of fact when gives rise to question of law.*

If the Court of fact whose decision on a question of fact is final, arrives at a decision of fact by considering material which is irrelevant to the enquiry, or by considering material which is partly relevent and partly irrelevent, or bases its decision partly on conjectures, surmises and suspicions and partly on evidence, then in such a situation clearly an issue of law arises. And in such a case, it is well established that when a court of fact acts on material, partly relevant and partly irrelevant, it is impossible to say to what extent the mind of the court was affected by the irrelevent material used by it in arriving at its finding. Such a finding is vitiated because of the use of inadmissible material and thereby an issue of law arises. *Dhiraj Lal* v. *I. T. Commr., Bombay.* **A I R 1955 S C 271.**

(1091) *S. 66—Finding of fact.*

Although the High Court will not disturb or go behind the finding of fact of the Tribunal, where it is competent for a Tribunal to make findings in fact which are excluded from review, the Appeal Court has always jurisdiction to intervene if it appears either that the Tribunal has misunderstood the statutory language—because the proper construction of the statutory language is a matter of law—or that the Tribunal has made a finding for which there is no evidence or which is inconsistent with the evidence and contradictory of it. *Liquidators of Pursa Ltd.* v. *I.T. Commr.*,

A I R 1954 S C 253
=1954 S C R 767
=1954 S C J 294.

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(1092) S. 66 (1) and (2) — Jurisdiction under S. 66 (2) and S. 66 (1) is conditional upon there being an order by Appellate Tribunal under S. 33 (4) and question of law arising therefrom—No order under S. 33 (4)—Refusal of Appellate Tribunal to state case—High Court has no jurisdiction under S. 66 (2). *I. T. Commr.* v. *Arunachalam Chettiar,*

A I R 1953 S C 118
=1953 S C R 486
=1953 S C J 115.

(1093) *Ss. 66 and 66A—New plea.*

Tribunal, at the instance of the assessee in exercise of its powers under S. 66 (1), properly referred the following question of law arising out of its order, to the High Court. "Whether on the facts of the case, income, profits and gains in respect of the sales made to the Government of India was received in British India within the meaning of S. 4 (1) (a) of the Act". On behalf of the Income-tax Authorities it was contended (on facts of the case) that the cheques had been accepted only conditionally and, therefore, there was no payment until the cheques had been cashed and the cheques having been cashed in Bombay the payment must be regarded as having been received in Bombay. That argument did not find favour with the High Court, whereupon the Income-tax Authorities sought to raise before the High Court as it did before the Supreme Court, an alternative argument, also based on facts, that the cheques having, at the request of the assessee, been posted at Delhi, the mere posting of the cheques in such circumstances operated as payment in Delhi. It was contended by the assessee before the Supreme Court that this was a new question of law and should not have been allowed to be raised.

Held that no new question of law was sought to be raised but the question of law was still the same and that, therefore, to accede to the contention of the assessee, will involve the undue cutting down of the scope of the question by altering its language, and inasmuch as the High Court had permitted this argument to be advanced before them the Supreme Court was not prepared to shut it out. *I. T. Commr.* v. *M/S. Ogale Glass Works Limited,*

A I R 1954 S C 429
=1954 S C J 577.

(1094) Ss. 66 (5) and 66-A (2)—Refusal of the High Court to hear the case on the

Indian Bar Councils Act (1926)

ground that the reference was incompetent whether a decision and judgment such as is contemplated by S. 66 (5) from which alone a right of appeal to Supreme Court is given (Quaere). *I. T. Commr.* v. *Arunachalam Chettiar*,

A I R 1953 S C 118
=1953 S C R 463
=1953 S C J 123.

(1094-A) **INDIAN BAR COUNCILS ACT (1926)** : *See* Bar Councils Act (1926)

(1094-B) **INDIAN COMPANIES ACT (1913)** ; *See* Companies Act (1913).

INDIAN INDEPENDENCE ACT (1947)

(1095) *S. 9— Orders under — Binding nature.*

The Orders promulgated on 14-8-1947 by the Governor-General of India before the partition in exercise of the powers conferred under S. 9, and containing provisions specially designed to remove the difficulties arising in connection with the transition to the new situation created by the partition are binding on both the Dominion of India and the Dominion of Pakistan. Among such Orders are the Indian Independence (Legal Proceedings) Order, 1947, and the Indian Independence (Rights, Property and Liabilities) Order, 1947. *State of Tripura* v. *East Bengal*,

A I R 1951 S C 23
=1951 S C J 70
=1951 S C R 1.

INDIAN INDEPENDECE (LEGAL PROCEEDINGS) ORDER (1947)

(1096) *Para 4 (2)—"If the proceedings were instituted in that Court."*

The words "if the proceedings were instituted in that Court" cannot be read as meaning "if the proceedings could have been instituted in that Court." The only construction which could be put upon this provision was that the Court having appellate or revisional jurisdiction over that Court would have such jurisdiction as if the proceedings had been instituted in that Court after the 15th August 1947.

Where, therefore, on 15-8-1947 certain proceedings were pending in a Court at *A*, over which the Calcutta High Court had appellate jurisdiction, in respect of properties which had gone to East Pakistan on 15-8-1947.

Indian Independence (Rights, Property and Liabilities) Order (1947)

Held that appeal from the order of the Court at *A* lay to the Calcutta High Court. A I R 1950 E P 149, *Approved. Asha Lata Debi* v. *Jadu Nath*,

A I R 1954 S C 409
=1954 SCJ 690.

INDIAN INDEPENDENCE (RIGHTS, PROPERTY AND LIABILITIES) ORDER (1947)

(1097) *Art. 9 — Financial obligations — Meaning — Claim for rent under a lease.*

It could not have been the intention of the framers of Art. 9 to confine the expression 'other financial obligations' only to claims for injunction or specific performance of a contract or the like. The expression, if construed 'ejusdem generis', implies an obligation in the nature of an obligation in respect of loans and guarantees incurred or undertaken by the State. A I R 1950 Cal 159; A I R 1950 Cal 463 and A I R 1951 Punj 382, *Ref.*

It is, however not necessary or desirable to attempt an exhaustive definition of the expression. The Court will have to consider in each case whether a particular obligation which may be the subject-matter of discussion falls within the expression 'financial obligation within the meaning of Art. 9:

Held, that the liability to pay rent under a lease certainly does not come within that expression. *The State of West Bengal* v. *Serajuddin*, **A I R 1954 S C 193**
=1954 S C J 63=194 S C R 378.

(1098) *Arts. 10 (2) 12 (2) — Transfer with respect to property—Transfer of rights and liabilities — Liability in respect of actionable wrong — Indian Independence (Legal Proceedings) Order (1947), Art. 4— (Bengal Agricultural Income-tax Act (IV [4] of 1944), S. 65).*

(Per *Kania, C. J., Patanjali Sastri and Chandrasekhara Aiyar JJ.)*—A suit instituted by the Tripura State, by its Ruler, on 12-6-1945 in the Court of Subordinate Judge Dacca and then transferred to the Court of Subordinate Judge, Alipore against the old Province of Bengal for a declaration that the Bengal Agricultural Income-tax Act (IV [4] of 1944) in so far as it purported to impose a liability to pay agricultural income-tax on an Indian State or its Ruler was *ultra vires* and that in any case the

Indian Independence (Rights, Property and Liabilities) Order (1947)

notice issued by the Agricultural Income-tax Officer, Dacca Range, to the Manager of the Zamindari Chakla Roshanabad belonging to the Tripura State and received by the latter at a place in the Tripura State, calling upon him to furnish a return of the total income derived in the previous year from the lands in the Zamindari used for agricultural purposes was without jurisdiction and for a perpetual injunction to restrain the defendant from taking any steps to assess the plaintiff cannot be said to have been instituted *with respect* to the property transferred, namely, Chakha Roshanabad from the old Province of Bengal to the Province of East Bengal under the scheme of the partition.

(Per *Kania, C. J., Fazl Ali, Patanjali Sastri, Mukherjea and Chandrasekhara Aiyar JJ.)* — Nor is there any transfer of "right" in such a case as the right to tax the agricultural income of the plaintiff was not derived by the Province of East Bengal by transfer under the Indian Independence (Rights, Property and Liabilities) Order (1947), but the right passed to that Province by virtue of S. 18 (3), Indian Independence Act (1947).

(Per *Kania, C. J., Patanjali Sastri, Mukherjea and Chandrasekhara Aiyar JJ.; Fazl Ali J. Contra*).—There is, however, a transfer of a liability in respect of an actionable wrong in such a case. The words "liability in respect of an actionable wrong" used in Art. 10 (2) (a) should not be understood in the restricted sense of a liability for damages for completed tortious acts. The words are apt to cover the liability to be restrained by injunction from completing what on the plaintiff's case was an illegal or unauthorised act already commenced. The service of a notice requiring a return of income to be furnished for assessment under the Bengal Agricultural Income-tax Act is a step fraught with serious consequences to the assessee, and if the assessment proposed was illegal and unauthorised by reason of the Act itself being *ultra vires* in so far as it purported to make the Rulers of Indian States liable to taxation thereunder as contended for by the plaintiff, the service of such notice marked the commencement of a wrongful act against the plaintiff by the Bengal Government under colour of the Act and such a wrongful act is actionable in the

Indian Independence (Rights, Property and Liabilities) Order (1947)

sense that an action would lie in a civil Court for an injunction restraining its completion. That was the liability to which the Province of Bengal was subject according to the plaintiff's case at the time when he instituted the suit, and the liability passed to the Province of East Bengal by virtue of Art. 10 (2) (a).

(Per *Kania C. J., Patanjali Sastri, Mukherjea and Chandrasekhara Aiyar JJ., Fazl Ali J. Contra).*—Such a suit was not barred by S. 65, Bengal Agricultural Income-tax Act (IV [4] of 1944) as the suit was not one to set aside or modify an assessment no assessment having yet been made.

(Per *Fazl Ali J).* — The latter part of S. 65 clearly excludes jurisdiction of the Court to prevent the Income-tax Officer from proceeding with an assessment which has already started. It will be a strange construction of the section to hold that although it bars suits to modify or set aside an assessment and though it bars all proceedings to restrain the Officer who is making the assessment from proceeding with it, yet it, leaves it open to a party to stop an assessment by claiming an injunction against the Provincial Government or the State instead of the Officer concerned.

(Per *Kania C. J. Patanjali Sastri Mukherjea and Chandrasekhara Aiyar JJ.)* —Assuming that Art. 10 (2) (a) was applicable on the ground that the cause of action did not arise wholly in the Province of East Bengal the Province will still be liable under Art. 10 (2) (c). Hence the Court of Subordinate Judge at Alipore would have jurisdiction to proceed with the suit after substituting the Province of East Bengal in the place of the old Province of Bengal against which the suit was originally brought under Art. 4, Indian Independence (Rights, Property and Liabilities) Order, 1947 : 53 C W N 368, REVERSED.

(Per *Fazl Ali J.)* — From the mere fact that the Province of East Bengal did intervene and applied for permission to file a written statement the only statement filed by it being that the Court had no jurisdiction to proceed with the suit, it cannot be held to have submitted to the jurisdiction of the Court. *State of Tripura* v. *East Bengal,* **A I R 1951 S C 23 =1951 S C J 70=1951 S C R 1.**

INDUSTRIAL DISPUTES

(1098-A) *Appeal— Appeal to Supreme Court —Question of jurisdiction —Cannot be raised for first time — (Constitution of India, Art. 136).*

Where the question of jurisdiction is not a pure question of law, but it is mingled with facts a party cannot be allowed to raise it for the first time in an appeal to the Supreme Court from the decision of the Appellate Tribunal. *U. C. Bank* v. *Secretary, U. P. Bank E. Union,*

A I R 1953 S C 437.

(1099) *Award —Time for making—Extension—(U. P. Industrial Disputes Act (28 of 1948), S. 3 (d)—Order under dated 15-3-1951)— (U. P. General Clauses Act (1 of 1904), S. 10 — General Clauses Act (1897), S. 10).*

An industrial dispute was referred to the Industrial Tribunal, by a notification dated 24-4-1951. The time for making the award expired on 9-6-1951 and on 9-6-1951 a further notification was issued extending the time for making the award up to 30-6-1951. 30-6-1951 was a public holiday and 1st July was a Sunday. The Industrial Tribunal made its award on 2nd July 1951 and pronounced it in open Court on that day.

Held, that the original period calculated in accordance with Para. 16 of the order dated 15-3-1951 under S. 3 (d), U. P. Industrial Disputes Act, expired on 9-6-1951 and the Uttar Pradesh Government validly extended the period up to 30-6-1951. The Industrial Tribunal was a Court within the meaning of S. 10, U. P. General Clauses Act, and, therefore, the decision which was pronounced on 2-7-1951 was well within time and was valid and binding on the parties. *Vishwamitra Press, Kanpur* v. *Workers of Vishwamitra Press.*

A I R 1953 S C 41=1953 S C J 13 =1953 S C R 272.

(1100) *Bonus — Conditions to be satisfied before demanding bonus.*

There are two conditions which have to be satisfied before demand for bonus can be justified and they are, (1) when wages fall short of the living standard and (2) the industry makes huge profits part of which are due to the contribution which the workmen make in increasing production. The demand for bonus becomes an industrial claim when either or both these conditions are satisfied. If in any particular year the working of the industrial concern has resulted in loss there is no basis nor justification for a demand for bonus. Bonus is not a deferred wage. Because if it were so it would necessarily rank for precedence before dividends. The dividends can only be paid out of profits and unless and until profits are made no occasion or question can also arise for distribution of any sum as bonus amongst the employees. If the industrial concern has resulted in a trading loss, there, would be no profits of the particular year available for distribution of dividends, much less could the employees claim the distribution of bonus during that year. (1952) 1 Lab L J 386 — (1952) 2 Lab L J 624 and (1953-1 Lab L J 466, *Approved.*

Social justice is a very vague and indeterminate expression and no clear-cut definition can be laid down which will cover all the situations. The concept of social justice does not emanate from the fanciful notions of any particular adjudicator but must be founded on a more solid foundation. The considerations of social justice are not only irrelevent but untenable where the workers by their own acts of indiscipline and strike contribute the trading loss incurred by their employer company and it hardly lies in their mouth to contend that they are none-the-less entitled to a payment of bonus commensurate with the dividend paid to the share-holders out of the undistributed profits of the previous years. *Muir Mills* v. *Suti Mills Mazdoor Union,*

A I R 1955 S C 170.

(1101) *Illegal discharge from service — Relief against —Discretion of Industrial Tribunal —Interference in appeal.*

Whether a discharged employee is to be reinstated in service, or whether compensation would be an adequate relief, is a matter for the discretion of the Industrial Tribunal and when they have exercised it in any particular way, it will not be interfered with in appeal unless there are reasons for such interference. *U. C. Bank* v. *Secretary, U. P. Bank E. Union,*

A I R 1953 S C 437.

INDUSTRIAL DISPUTES ACT (1947)

(1102) *Preamble — Vires.*

Act encroaching upon powers of Municipal Commissioner to dismiss or appoint Municipal servant—Act is not *ultra vires*, because there is encroachment on provincial subject, viz., local Government. A I R 1947

Industrial Disputes Act (1947)

P C 60 *Ref. D. N. Banerjee* v. *P. R. Mukherjee,* **A I R 1953 S C 58 =1953 S C J 19=1953 S C R 302.**

(1103) *S. 2 (j) and (k)—Interpretation.* In considering the meaning of these terms, background of social structure in industrial evolution has to be taken into account. *D. N. Banerjee* v. *P. R. Mukherjee,* **A I R 1953 S C 58 =1953 S C J 19=1953 S C R 302.**

(1104) *S. 2 (j), (k) and (s) — Scope.* These terms must be given very wide import —"Industry" includes within its scope what might not strictly be called trade or business. *D. N. Banerjee* v. *P. R. Mukherjee,* **A I R 1953 S C 58 =1953 S C J 19=1953 S C R 302.**

(1105) *S. 2 (j) and (k) — Municipal service.* The definitions in the Act include also dispute that might arise between municipalities and their employees in branches of work that can be said to be analogous to the carrying out of a trade or a business. (1943) A C 166 and 26 Com-W. L R 508 *Ref.*

Quaere: Whether disputes arising in relation to purely administrative work fall within their ambit. *D. N. Banerjee* v. *P. R. Mukherjee,* **A I R 1953 S C 58 =1953 S C J 19=1953 S C R 302.**

(1106) Ss. 2 (k) and 22 — Conciliation proceedings pending—Dismissal of workmen with permission of Assistant Regional Conciliation Officer — Such dismissal itself can form industrial dispute—Scope of enquiry before Regional Conciliation Officer, before granting permission to dismiss, stated—What cl. 24 (1) of U. P. Government Order dated 10.3.1948 under U. P. Act (28 of 1947) does is to prevent party to pending proceeding from challenging written permission—Written permission only removes ban on dismissal during pendency of proceedings — Discretion in dismissing is of employer — In case of dismissal, industrial dispute would arise (U. P. Industrial Disputes Act (28 of 1947), S. 3 — Notification No. 781 (L)/XVIII dated 10.3.1948, cls. 23 and 24 (1) (Industrial Disputes—Dismissal pending proceedings). *Atherton West & Co.* v. *S. M. Mazdoor Union,* **A I R 1953 S C 241 1953 S C R 780=1953 S C J 330.**

(1107) *Ss. 2 (q) and 24 — Textile industry—Cessation of work by large number of workers for few hours as a result of concerted action—Notice not given—Illegal strike—Benefit of holidays according to leave rules—(Factories Act (1934), Ss. 49-A and 49-B).*

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On 1-11-1948, 859 night shift operatives of the carding and spinning department of the Carnatic Mills, a public utility industry, stopped work, some at 4 p. m., some at 4-30 p. m. and some at 5 p. m, The stoppage ended at 8 p. m. in both the departments. By 10 p. m. the strike ended completely. The apparent cause for the strike was that the management of the Mills had expressed its inability to comply with the request of the workers to declare the forenoon of 1st November 1948 as a holiday for solar eclipse. When the dispute was referred to the Industrial Tribunal, the adjudicator found on the evidence and circumstances of the case that there was concert and combination of the workers in stopping and refusing to resume work on the night of 1st November. He observed that the fact that a very large number of leave applications was put in for various reasons pointed to the concerted action and that the applications given by the workers and their representatives also indicated that they were acting in combination both in striking and refusing to go back to work on the ground that they were entitled to leave for the night shift whenever half a day's leave was granted to the day-shift workers:

Held (i) that the action of the workers on the night in question amounted to a strike within the definition of that term in S. 2 (q) and as no notice of the same had been given to the management it was an illegal strike. The workers on strike, therefore, lost the benefit of the holidays that they would have otherwise got under the leave rules of the Mill.

(ii) that in view of the Madras Government Notification dated 23.8.1945, Ss. 49A and 49B, Factories Act, had no application to the Mill in question. (1951) 2 Lab. L. J. 314, *Reversed: The Buckingham and Carnatic Co.* v. *Workers of the Buckingham and Carnatic Co. Ltd.,* **A I R 1953 S C 47 =1953 S C J 15=1953 S C R 219.**

(1108) Ss. 7, 8, 15, 16, 38 — Industrial tribunal—Industrial Disputes Rules (1949), R. 5 — Services of member ceasing to be available — Jurisdiction of remaining

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members to continue proceedings if affected —Member rejoining and influencing decision of other members — Effect on validity of award — Fresh constitution of tribunal, if necessary.

Per *Kania C. J., Mahajan, Das, Bose & Mukherjea JJ., (Fazal Ali and Patanjali Sastri JJ.* dissenting) — In respect of a Tribunal when the services of a member other than the Chairman have ceased to be available, the rest by themselves have no right to act as the Tribunal, without the Government reconstituting the Tribunal as a Tribunal of the remaining members. *U. C. Bank* v. *Their Workmen*,

A I R 1951 S C 230 =1951 S C J 334=1951 S C R 380.

(1109) *Ss. 7 and 8 — Constitution of tribunal for limited period – Vacancy.*

Under the provisions of S. 7, the appropriate Government has ample power of constituting a tribunal for a limited time, intending thereby that its life would automatically come to an end on the expiry of that time. When the tribunal constituted for a limited period automatically comes to an end after the expiry of the period, the appropriate Government can constitute another tribunal and refer to it the disputes which were pending before the first tribunal and had remained undisposed.

When the life of the first tribunal automatically comes to end by efflux of time, no question of vacancy in the office really arises and it is not a case falling under sub-cl. (2) of S. 8 but the situation that arises falls within the ambit of S. 7. (The new notification must be held to be under S. 7 and reference to S. 8 must be considered to be surplusage).

If any prejudice is caused to the parties, it will be open to the newly constituted tribunal to begin the hearing of the disputes from the very first stage but where all that happened to the disputes when they were pending before the first tribunal was that only issues were framed, if any party has any objection to those issues, it would be open to the newly constituted tribunal to reframe those issues. *Minerva Mills Ltd.* v. *Workers*,

A I R 1953 S C 505 =1953 S C J 659.

(1110) *S. 7 — Qualification of tribunal — (Industrial Disputes (Appellate Tribunal)Act (48 of 1950), S. 34) — (Rajasthan Adaptation of Central Laws Ordinance (4 of 1950), S. 5)*

Industrial Disputes Act (1947)

The Industrial Disputes (Appellate Tribunal) Act (48 of 1950) came into force on May 20 1950. The appointment of one *S* as Industrial Tribunal was made on October 9, 1950 i. e., after the Industrial Disputes Act had become applicable to Rajasthan. It is not necessary therefore to invoke the provisions of Ordinance 4 of 1950 in deciding the question of the validity of his appointment. The effect of S. 34 of the Act 48 of 1950 was to extend the territorial application of the Industrial Disputes Act, 1947 to the whole of India including Rajasthan, the exception being the State of Jammu and Kashmir only. This being so, the words "A Judge of a High Court and a District Judge" used in S. 7 (3) (a) and (b) respectively of the Industrial Disputes Act, 1947, must be held now to include "A Judge of the High Court and a District Judge in the former State of Jodhpur." There is now no room for the application of S. 5 of Ordinance 4 of 1950 according to which a Judge of the High Court and a District Judge could only mean a Judge of the High Court for Rajasthan established under the Rajasthan High Court Ordinance 1949 and a District Judge of or in Rajasthan within the meaning of S. 5 (ix) of Ordinance No. 4 of 1950. Accordingly the appointment of *S* was perfectly valid. *Rajasthan State* v. *Mewar Textiles Mills*,

A I R 1954 S C 396 =1954 S C J 455.

(1111) *Ss. 7 and 15—Industrial Tribunal discharges judicial functions though not a Court.*

Per *Kania C. J., Fazl Ali and Mahajan JJ. ; Mukherjea and Patanjali Sastri JJ. Contra.* — The Industrial Tribunal set up under S. 7, Industrial Disputes Act, 1947, has all the necessary attributes of a Court of justice. The fact that the Government has to make a declaration under S. 15 (2) of the Act after the final decision of the tribunal is not in any way inconsistent with the view that the tribunal acts judicially. Thus, the functions and duties of the Industial Tribunal are very much like those of a body discharging judicial functions, although it is not a Court in the technical sense of the word. *Bharat Bank* v. *Employees of Bharat Bank*.

AIR 1950 S C 188 =1950 S C R 459.

Industrial Disputes Act (1947)

(1112) *S. 10 (1) — Reference in general terms—Dispute not particularised—Validity — Jurisdiction of the Court.*

The Government must have sufficient knowledge of the nature of the dispute to be satisfied that it is an industrial dispute within the meaning of the Act, as, for instance, that it relates to retrenchment or reinstatement. But, beyond this no obligation can be held to lie on the Government to ascertain particulars of the disputes before making a reference under S. 10 (1) or to specify them in the order. The reference under S. 10 (1) (c) is not, therefore, incompetent merely because it is made in general terms and the disputes are not particularised. AIR 1951 Mad 191, *Reversed.*

Though it is desirable that the Government should, wherever possible, indicate the nature of the dispute in the order of reference, it must be remembered that in making a reference under S. 10 (1) the Gov. ernment is doing an administrative act and the fact that it has to form an opinion as to the factual existence of an industrial dispute as a preliminary step to the discharge of its function does not make it any the less administrative in character. The Court cannot, therefore, canvass the order of reference closely to see if there was any material before the Government to support conclusion, as if it was a judicial or quasi-judicial determination. No doubt, it will be open to a party seeking to impugn the resulting award to show that what was referred by the Government was not an industrial dispute within the meaning of the Act, and that, therefore, the Tribunal had no jurisdiction to make the award. But, if the dispute was an industrial dispute as defined in the Act, its factual existence and the expediency of making a reference in the circumstances of a particular case are matters entirely for the Government to decide upon, and it will not be competent for the Court to hold the reference bad and quash the proceedings for want of jurisdiction merely because there was, in its opinion, no material before the Government on which it could have come to an affirmative conclusion on those matters. *Madras State* v. *C. P. Sarathy*,

AIR 1953 S C 53=1953 S C J 39.

(1113) *S. 10 (1) (c) — Reference under — Nature of — Not analogous to arbitration proceedings—Scope of adjudication is wider.*

Industrial Disputes Act (1947)

The adjudication by the Tribunal is only an alternative form of settlement of the disputes on a fair and just basis having regard of the prevailing conditions in the industry and is by no means analogous to what an arbitrator has to do in determining ordinary civil disputes according to the legal rights of the parties. The notion that a reference to a Tribunal under the Act must specify the particular disputes appears to have been derived from the analogy of an ordinary arbitration. But the analogy is somewhat misleading. The scope of adjudication by a Tribunal under the Act is much wider. A I R 1949 F C 111, *Rel. on.* AIR 1949 Mad 616, *Ref. Madras State* v. *C. P. Sarathy*,

AIR 1953 S C 53=1953 S C J 39.

(1114) *Ss. 10, 16—Wrongful dismissal — (Constitution of India, Arts. 226, 227).*

Dismissal whether wrongful is a question for Tribunal — No interference by High Court under Arts. 226 and 227 unless there is grave miscarriage of justice or flagrant violation of law. *D. N. Banerjee* v. *P. R. Mukherjee*, **AIR 1953 S C 58 =1953 S C R 302=1953 S C J 19.**

(1115) S. 15 (4)—Sub-s. (4) of S. 15 does not affect Art. 136, Constitution of India—Constitution of India, Art. 136. *Bharat Bank* v. *Employees of Bharat Bank*,

A I R 1950 S C 188 =1950 S C R 459.

(1116) S. 18 — Award under — Duty of Court — Courts should not be astute to discover formal defects and technical flaws to overthrow settlements. *Madras State* v. *C. P. Sarathy*, **AIR 1953 S C 53 =1953 S C J 39.**

(1117) *Ss. 22 (1) (d) and 20 (2) (b) — "Received."*

Strike commenced before actual receipt by appropriate Government of report of conciliation officer is illegal — Conciliation proceeding is deemed to terminate upon such receipt when no settlement is arrived at—Receipt by Chief Labour Commissioner, New Delhi, is not receipt by Central Government since he is not agent of Central Government for such purposes—The callous indifference or utter inefficiency and slackness apparently prevailing in the office of the Chief Labour Commissioner strongly deprecated. A I R 1927 All 215, *Disting. Workers of*

Industrial Disputes (Appellate Tribunal) Act (1950)

the Industry Colliery, Dhanbad v. *Management of the Industry Colliery, Dhanbad,*
AIR 1953 S C 88=1953 S C R 428
=1953 S C J 109.

(1118) *S. 29—Prosecution for breach of term of award—Expiry of award—Effect.*

When a party to an award by an industrial Tribunal commits a breach of some of the terms of the award which was in force at the time, he incurs the liability to be prosecuted under the Act and the fact that the award subsequently expired cannot affect that liability. The analogy of prosecution under a temporary Act does not apply as the prosecution is for an offence made punishable by S. 29 of Act, 14 of 1947, which is a permanent Act. The prosecution is not rendered invalid by the expiry of the award. *Madras State* v. *C. P. Sarathy,*
AIR 1953 S C 53
=1953 S C J 39.

(1119) *Ss. 33, 33-A (as amended in 1955)—Scope.*

The provisions of the two new Ss. 33 and 33-A of the 1947 Act correspond to and are 'in pari materia' with the provisions of Ss. 22 and 23 of the 1950 Act and are more or less in similar terms. *Automobile Products of India* v. *Rukmaji Bala,*
AIR 1955 S C 258.

INDUSTRIAL DISPUTES (APPELLATE TRIBUNAL) ACT (1950)

(1120) *S. 7 (a)—Findings on merits of the case without hearing appellant—(Industrial Disputes — Appellate Tribunal — Jurisdiction).*

Even though the Appellate Tribunal confines its jurisdiction to determining substantial questions of law involved in the appeal, it is not legitimate for it suo motu to consider the merits of the appeal and arrive at finding regarding the same and express an opinion on the merits without hearing the appellants in regard to it. *Atherton West and Co.* v. *S. M. Mazdoor Union,*
A I R 1953 S C 241
=1953 S C R 780=1953 S C J 333.

(1121) *Ss. 22, 23 — Scope.*

The ordinary and primary jurisdiction of the appellate tribunal is appellate; S. 22 confers on the appellate tribunal a special jurisdiction which is in the nature of original jurisdiction; S. 23 also vests in the tribunal an additional jurisdiction to decide the complaint as if it were an appeal pending before it; and S. 23 confers on the

Industrial Disputes (Appellate Tribunal) Act (1950)

workmen an additional remedy which they did not have under the 1947 Act. *Automobile Products of India* v. *Rukmaji Bala,*
A I R 1955 S C 258.

(1122) *S. 22 — Power to impose conditions — (Industrial Disputes Act (1947), S. 33, as amended in 1950).*

The object of S. 22 of the 1950 Act like that of S. 33 of the 1947 Act as amended is to protect the workmen concerned in disputes which form the subject-matter of pending proceedings against victimisation by the employer on account of their having raised industrial disputes or their continuing the pending proceedings. It is further the object of the two sections to ensure that proceedings in connection with industrial disputes already pending should be brought to a termination in a peaceful atmosphere and that no employer should during the pendency of those proceedings take any action of the kind mentioned in the sections which may give rise to fresh disputes likely to further exacerbate the already strained relation between the employer and the workmen.

To achieve this object a ban has been imposed upon the ordinary right which the employer has under the ordinary law governing a contract of employment. Section 22 of the 1950 Act and S. 33 of the 1947 Act which impose the ban also provide for the removal of that ban by the granting of express permission in writing in appropriate cases by the authority mentioned therein. The purpose of these two sections being to determine whether the ban should be removed or not, all that is required of the authority exercising jurisdiction under these sections is to accord or withhold permission. There is no machinery provided in S. 33 of the 1947 Act or S. 23 of the 1950 Act for enforcing the decision of the authority named in those sections. This also indicates that those sections only impose a ban on the right of the employer and the only thing that the authority is called upon to do is to grant or withhold the permission, i.e., to lift or maintain the ban.

Section 22 of the 1950 Act is 'in pari materia' with S. 33 of the 1947 Act and Cl. 33 of the U. P. Government Notification. Imposition of conditions is wholly collateral to the above purpose and the authority cannot impose any condition.

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Hence the Labour Appellate Tribunal was in error in holding that it had jurisdiction to impose conditions as a prerequisite for granting permission to the employer company to retrench its workmen. (1953) 1 Lab L J 85; (1954) 2 Lab L J 635, *Approved*; A I R 1953 S C 241, *Rel. on.*; (1896) 2 Q B 386, *Disting Automobile Products of India* v. *Rukmaji Bala*,

A I R 1955 S C 258.

(1123) *Ss. 23, 29—Power of the Tribunal under S. 23—Industrial Disputes Act (1947), S. 33-A.*

The scope and ambit of the jurisdiction conferred on the authority named in S. 33-A of the 1947 Act and S. 23 of the 1950 Act is wider than that conferred on the Criminal Court by S. 31 of the 1947 Act and S. 29 of the 1950 Act. The Criminal Court under the two last mentioned sections is only concerned, with yea or nay whether there has been a contravention of the respective provisions of the sections mentioned therein, but the authority exersing jurisdiction under S. 33-A of the 1947 Act and S. 23 of the 1950 Act is to adjudicate upon or decide the complaint "as if it were a dispute referred to or pending before it" in the first case or "as if it were an appeal pending before it" in the second case. The authority is, therefore, enjoined to go into the merits of the act complained of under S. 33-A of the 1947 Act and S. 23 of the 1950 Act. In this sense the jurisdiction of the authority named in these two sections is certainly wider than that of the Criminal Court exercising jurisdiction under the penal sections referred to above.

Having regard to the scope of the enquiry under S. 33-A of the 1947 Act and S. 23 of the 1950 Act it must follow that the power of the authority to grant relief must be co-extensive with its power to grant relief on a reference made to it or on an appeal brought before it, as the case may be. The authority referred to in these sections must have jurisdiction to do complete justice between the parties relating to the matters in dispute and must have power to give such relief as the nature of the case may require. In short, these two sections give to the workmen a direct right to approach the Tribunal or Appellate Tribunal for the redress of their grievance without the intervention of the appropriate Government which they did not possess before 1950 and they

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provide for speedy determination of disputes and avoid multiplicity of proceedings by giving complete relief to the workmen in relation to their grievances arising out of the action taken by the employer in contravention of the provisions of the relevant sections. (1951) 2 Lab L J 341—A I R 1953 Bom 133—(1952) 1 Lab L J 381, Approved. *Automobile Products of India* v. *Rukmaji Bala* **A I R 1955 SC 258.**

(1124) *Ss. 24, 27—Appeal need not be competent or valid.*

Section 24 requires for its application no more than that an appeal should be pending and there is nothing in its language to justify the introduction of the qualification that it should be valid or competent.

Thus, where the office-bearers of a Union, during the pendency of an appeal before an Appellate Tribunal made speeches exhorting the workers to go on strike and when prosecuted and convicted under S. 27 they raised the contention that the conviction was illegal because the appeal which was pending was not competent and valid:

Held that the contention was not tenable. A I R 1932 P C 165, *Foll. Raja Kulkarni* v. *State of Bombay.* **A I R 1954 S C 73 =1954 S C R 384 =1954 S C J 50.**

(1125) *Ss. 24 and 27 — Object and scope.*

The legislature in introducing S. 24 contemplated that industrial peace should not be disturbed so long as the matter was pending in the Court of appeal, irrespective of the fact whether such an appeal was competent in law. If this were not the case, the parties could easily defeat the object of the legislature by arrogating to themselves the right to decide about the competency of the appeal without reference to the Court, commit a breach of the peace and escape the penalty imposed by S. 27. *Raja Kulkarni* v. *State of Bombay.*

A I R 1954 S C 73 =1954 S C R 384 =1954 S C J 50.

(1126) *S. 27—Validity— (Constitution of India, Arts. 19 (1) (a) (c), 14).*

The Labour Disputes (Appellate Tribunal) Act, 1950 imposes no restriction either upon the freedom of speech and expression of the Textile workers or their

(U. P.) Industrial Disputes Act (1947)

right to form associations or Unions. Similarly, it makes no discrimination between Textile workers as a class but lays down a reasonable classification to the effect that a certain percentage of membership possessed by a Union will be allowed to represent the workers as a class to the exclusion of others, but there is nothing to prevent the other Unions or other workers from forming a fresh Union and enrolling a higher percentage so as to acquire the sole right of representation. Hence, S. 27 of the Industrial Disputes (Appellate Tribunal) Act is not void as being opposed to the fundamental rights under Art. 19 (1) (a) and (c) and Art. 14 of the Constitution. *Raj Kulkarni* v. *State of Bombay.* **A I R 1954 S C 73 =1954 S C R 384 =1954 S C J 50.**

(U. P.) INDUSTRIAL DISPUTES ACT, 1947

(1127) Ss. 3 and 6—Government Order No. 388 (XI) (XVIII) 37 (LL) 50), dated 2-3-1951 amending Cls. 4 and 7 (3) of Original Order dated 10-3-1948—Award of Regional Conciliation Board, consisting of three members signed by two who alone were present on the last date of hearing—Award is not void and inoperative (Industrial Disputes—Award—Signing of). *Atherton West & Co.* v. *S. M. Mazdoor Union,* **A I R 1953 S C 241 =1953 S C R 780 =1953 S C J 333.**

(1128) *S. 6 (1) — Extension of time—(U. P. General Clauses Act (1 of 1904), Ss. 14 and 21).*

The State Government has not the power to extend the time for making an award 'ex post facto' i.e, after the time limit originally fixed therefor has expired. S. 14, U. P. General Clauses Act, does not in terms. or by necessary implication, give any such power of extension of time nor can any support be derived from S. 21 of that Act to validate the award passed after the expiry of the time originally fixed, though the order giving extension ex facie purports to modify the original order fixing the time limit. *Straw Board Manufacturing Company* v. *G. Mills Union,* **A I R 1953 S C 95 =1953 S C R 439 =1953 S C J 104.**

INFLUX FROM PAKISTAN (CONTROL) ACT (23 of 1949)

(1129) *S. 7—Validity—Constitution of India, Arts. 13 (1) and 19 (1) (d), (e) and (5).*

Per *Mehr Chand Mahajan C. J., B. K. Mukherjea, Vivian Bose and Ghulam Hasan JJ.: (Das J. dissenting)*: Section 7, Influx from Pakistan Control Act, in so far as it infringes the fundamental right of a citizen of India under Art. 19 (1) (e) of the Constitution of India, is declared void under Art. 13 (1).

The question whether an offence has been committed is left entirely to the subjective determination of the Government. The inference of a reasonable suspicion rests upon the arbitrary and unrestrained discretion of the Government, and before a citizen is condemned, all that the Government has to do is to issue an order that a reasonable suspicion exists in their mind that an offence under S. 5 has been committed. The section does not provide for the issue of a notice to the person concerned to show cause against the order nor is he afforded any opportunity to clear his conduct of the suspicion entertained against him This is nothing short of a travesty of the right of citizenship.

A law which subjects a citizen to the extreme penalty of a virtual forfeiture of his citizenship upon conviction for a mere breach of the permit Regulations or upon a reasonable suspicion of having committed such a breach can hardly be justified upon the ground that it imposes a reasonable restriction upon the fundamental right to reside and settle in the country in the interest of the public. The Act purports to control admission into and regulate the movements in India of persons entering from Pakistan but S. 7 oversteps the limits of control and regulation when it provides for removal of a citizen from his own country. The effect of the provisions of the Act, however, has no reasonable relation to the subject in view but is so drastic in scope that it goes much in excess of that object, AIR 1951 S C 118, *Ref. to.*

The argument that S. 7 is consequential to S. 3 and that if S. 3 controlling admission by means of a permit is valid, S. 7 must be held to be equally valid is fallacious. In the first place, S. 7 is by no means wholly consequential to S. 3. The first part no doubt renders the person concerned liable to removal upon conviction under S. 5 but further empowers the Central Government to

pass the same order independently of these provisions even where there is no conviction and a reasonable suspicion exists that an offence has been committed. Assuming, however, that S. 7 is consequential to S. 3 it gives no opportunity to the aggrieved person to show cause against his removal. There is no forum provided to which the aggrieved party could have recourse in order to vindicate his character or meet the grounds upon which it is based. Neither the Act nor the rules framed thereunder indicate what procedure is to be followed by Government in arriving at the conclusion that a breach of S. 3 or the rules under S. 4 has taken place.

A citizen of India who returns to the country without a permit or without a valid permit does not commit such a grave offence as to justify his expulsion from the country. The object of the Act is not to deport Indian nationals committing a breach of the permit or passport Regulations but merely to control admission into and regulate movements in India of persons from Pakistan and, therefore, there is no substance in the argument that S. 7 was intended to achieve the objective of expelling Indian citizens, by and large, if they brought themselves within the mischief of section.

Per *Das J.*—The provisions of S. 7 were nccessary and reasonable and fell within Cl. (5) of Art. 19. The provisions appear to have been eminently reasonable restrictions imposed in the interests of the general public upon the exercise by Indian citizen coming from Pakistan without a permit of the rights conferred by Art. 19 (1) (d) and (e) of the Constitution.

The act authorised by S. 7 was in essence a purely executive act for implementing the provisions of S. 3. Without such a provision it would have been impossible for the State to control the admission into India of persons from Pakistan and to prevent the concommitant dangers. The act authorised by the section being an executive act, discretion had perforce to be left to the executive Government which by reason of the information available to it, was in a much better position than the Courts to know and judge the antecedents of such a person and his ultimate purpose.

The Indian citizen who was thrown out for not having the proper permit or who was suspected to have violated the provisions

of the Act was placed in no worse position than an Indian cittzen who, not having a permit, had not been permitted to enter into India at all. They were by no means without remedy. *Ebrahim Vazir* v. *State of Bombay*,

A I R 1954 S C 229
=1954 S C R 933.

(1130) *S. 7—If conflicts with Art. 20 (2)—(Constitution of India, Art. 20 (2)—Double jeopardy).*

Section 7 of the Act is not in conflict with Art. 20 (2) of the Constitution as there is no second prosecution for the same offence and therefore no question of double jeopardy arises. A I R 1953 S C 325, *Rel. on.*

Sections 3 & 7 applied to all persons coming from Pakistan whether they were citizens or non-citizens and irrespective of community to which they belonged or the religion which they professed. As regards citizens, they did not touch all citizens but affected only such of them as came from Pakistan, whether they were Hindus, Muslims or Christians. The act applied to a small well-defined class of persons who were grouped together on an obviously reasonable basis of classification. In this view of the matter no question of unconstitutional discrimination can arise at all. *Ebrahim Vazir* v. *State of Bombay*,

A I R 1954 S C 229=1954 S C R 933.

(1131) *Act if discriminatory—(Constitution of India, Art. 14).*

The Act applies to citizens as well as non-citizens. It applies to all communities irrespective of caste or creed. The Act cannot be held to be discriminatory. *Ebrahim Vazir* v. *State of Bombay*,

A I R 1954 S C 299=1954 S C R 933.

INTERNATIONAL LAW (PRIVATE)

(1132) *Domicil — Principles determining domicil—Domicil of origin in Multan District—Subsequent migration to India—Effect—(Constitution of India, Art. 5).*

Two constituent elements that are necessary by English Law for the existence of domicil are: (1) a residence of a particular kind, and (2) an intention of a particular kind. There must be the factum and there must be the animus. The residence need not be continuous but it must be indefinite not purely fleeting. The intention must be a present intention to reside for ever in the

country where the residence has been taken up.

It is also a well established proposition that a person may have no home but he cannot be without a domicil and the law may attribute to him a domicil in a country where in reality he has not.

In order to make the rule that nobody can be without a domicil effective, the law assigns what is called a domicil of origin to every person at his birth. This prevails until a new domicil has been acquired, so that if a person leaves the country of his origin with an undoubted intention of never returning to it again, nevertheless his domicil of origin adheres to him until he actually settles with the requisite intention in some other country.

Where therefore a person and his ancestors lived in Multan district, had a considerable business there, and had no home in India, his domicil of origin must be held to be in the district of Multan and when the district of Multan fell by the partition of India in Pakistan, he had to be assigned Pakistan domicil till the time he expressed his unequivocal intention of giving up that domicil and of acquiring Indian domicil and also took up his residence in India. His domicil cannot be determined by his family coming to India and without any finding that he had established a home for himself there. Even if the animus can be ascribed to him, the factum of residence is wanting in his case; and in the absence of that fact, an Indian domicil cannot be ascribed to him. *Central Bank of India* v. *Ram Narain*,

A I R 1955 S C 36.

INTERPRETATION OF STATUTES

(1133) *Administrative law — Public orders.—Construction — Deed, construction —Public orders.*

Public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant or of what was in his mind or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself. *Commr. of Police* v. *Gordhandas*,

AIR 1952 S C 16=1951 S C J 803.

(1134) *Admission of a party—Does not affect construction—(Evidence Act (1872), S. 115).*

When the facts are fully set out and admitted, a party's opinion about the legal effct of those facts is of no consequence in construing the section. No estoppel arises by reason of the admission of the party as to such effect. *Kalidas* v. *State of Bombay*,

A I R 1955 S C 62.

(1135) *Constitution.*

The speeches made by the members of the Constituent Assembly in the course of the debates on the draft Constitution cannot be used in interpreting an Article of the Constitution: 22 Cal 788 (P. C.) *Rel. on. State of Travancore Cochin* v. *Bombay Company Ltd.*

AIR 1952 S C 366=1952 S C R 1112 = 1952 S C J 527.

(1136) *Constitution of India — Importing of American expression—Constitution of India, Preamble.*

Per *Mukherjea J.* — In interpreting the provisions of Indian Constitution, the Court should go by the plain words used by the Constitution makers and the importing of expressions like 'police power' which is a term of variable and indefinite connotation in American law can only make the task of interpretation more difficult. *Charanjit Lal* v. *Union of India*,

A I R 1951 S C 41 = 1951 S C J 29 = 1950 S C R 869.

(1137) *Construction to fill gaps and omissions — (Civil P. C. (1908), Pre.)*

No doubt it is the duty of the Court to try and harmonise the various provisions of an Act passed by the Legislature. But it is certainly not the duty of the Court to stretch the words used by the Legislature to fill in gaps or omissions in the provisions of an Act. *Hira Devi* v. *District Board Shahjahanpur*,

A I R 1952 S C 362=1952 S C R 1122 = 1952 S C J 533.

(1138) *Constitution Statutes—Interpretation of — Words used in.*

Per *Kania C. J.*—In the construction of a statute, particularly a Constitution, it is improper to omit any word which has a reasonable and proper place in it or to refrain from giving effect to its meaning. *Gopalan* v. *State of Madras*,

A I R 1950 S C 27 = 1950 S C J 174 = 1950 S C R 88.

Interpretation of Statutes

(1139) *Constitution Statutes—Interpretation of — Report of drafting committee and the debate how for can be referred.*

Per *Kania C. J.*—Report of the drafting committee of the Constituent Assembly may be read not to control the meaning of an article in the Constitution of India, but may be seen in case of ambiguity. While it is not proper to take into consideration individual opinions of members of Assembly to construe the meaning of any particular article, when a question is raised whether a certain phrase or expression was up for consideration at all or not, reference to the debates may be permitted. *Gopalan* v. *State of Madras*,

A I R 1950 S C 27 = 1950 S C J 174 = 1950 S C R 88.

(1140) *Constitution Statutes — Repugnancy or conflict in parts—Presumption as to absence of.*

Per *B. K. Mukherjee J.* — The Constitution must be interpreted in a broad and liberal manner giving effect to all its parts, and the presumption should be that no conflict or repugnancy was intended by its framers. In interpreting the words of a Constitution, the same principles undoubtedly apply which are applicable in construing a statute, but the ultimate result must be determined upon the actual words used not in vacuo but as occurring in a single complex instrument in which one part may throw light on the other. *Gopalan* v. *State of Madras*.

A I R 1950 S C 27 = 1950 S C J 174 = 1950 S C R 88.

(1141) *Interpretation of Constitution — (Civil P. C. (1908) Pre.)*

(Per *Jagannadhadas J.*)—A constitution has to be liberally construed so as to advance the content of the right guaranteed by it. But where there is a deliberate choice of the language used, and where it is not unlikely that having regard to the goal that the Constitution of caution and restraint may well have been intended as to the limits of the right, the intendment of the language used has to prevail. *State of West Bengal* v. *Subodh Gopal Bose*,

A I R 1954 S C 92 =1954 S C R 587 =1954 S C J 127.

(1142) *Interpretation of Constitution — (Civil P. C. (1908), Pre.).*

(Per *Patanjali Sastri, C. J.*)—In interpreting the provisions of our Constitution, we should go by the plain words used by the Constitution-makers and the importing of expressions like 'police power', which is a term of variable and indefinite connotation in American law, can only make the task of interpretation more difficult. *State of West Bengal* v. *Subodh Gopal Bose*,

A I R 1954 S C 92 =1954 S C R 587 =1954 S C J 127.

(1143) *Constitutional enactment—(Government of India Act (1935), Sch. VII, Lists) — (Constitution of India, Preamble and Sch. VII, Lists) — (Civil P. C. (1908), Preamble).*

The rules which apply to the interpretation of other statutes apply equally to the interpretation of a constitutional enactment subject to this reservation that their application is of necessity conditioned by the subject-matter of the enactment itself. None of the items in the Lists is to be read in a narrow or restricted sense and each general word should be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in it. It is, therefore, clear that in construing an entry in a List conferring legislative powers the widest possible construction according to their ordinary meaning must be put upon the words used therein. Reference to legislative practice may be admissible for cutting down the meaning of a word in order to reconcile two conflicting provisions in two legislative Lists or to enlarge their ordinary meaning. The cardinal rule of interpretation, however, is that words should be read in their ordinary, natural and grammatical meaning subject to this rider that in construing words in a constitutional enactment conferring legislative power the most liberal construction should be put upon the words so that the same may have effect in their widest amplitude. *Navinchandra* v. *Commr. of I. T. Bombay*, **A I R 1955 S C 58.**

(1144) *Constitutional Law—(Constitution of India, Preamble; Seventh Schedule, List II, Entry 54)—(Government of India Act, 7th Sch., List II, Art. 48) — (Civil P. C. (1908), Preamble).*

The intention of the Constituent Assembly as expressed in Entry 54 in List II of the Seventh Schedule to the Constitution cannot be a guide for ascertaining the intention of a totally different body, namely, the British

Interpretation of Statutes

Parliament, in enacting Entry 48 in List II of the Seventh Schedule to the Government of India Act, 1935. *V. M. Sayed Mohammad & Co.* v. *State of Andhra*,

A I R 1954 S C 314
=1954 S C J 390.

(1145) *Deeming provision—(Civil P. C. (1908), Pre.)*

When a statute enacts that something shall be deemed to have been done, which in fact and truth was not done, the Court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to and full effect must be given to the statutory fiction and it should be carried to its logical conclusion : (1881) 17 Ch D 746 and (1952) A C 109, *Rel. on. State of Bombay* v. *Pandurang Vinayak*,

A I R 1953 S C 245
=1953 S C R 773
=1953 S C J 330.

(1146) *Defect in phraseology — Duty of Court—(Civil P. C. (1908), Pre.).*

It is not competent to any Court to proceed upon the assumption that the Legislature has made a mistake. The Court must proceed on the footing that the Legislature intended what it has said. Even if there is some defect in the phraseology used by the Legislature the Court cannot aid the Legislature's defective phrasing of an Act or add and amend or, by construction, make up deficiencies which are left in the Act. Even where there is a *casus omissus*, it is for others than the Courts to remedy the defect: (1891) A C 531; 4 Moo Ind App 179 and A I R 1933 P C 63, *Rel. on. Nalinakhya* v. *Shyam Sunder*,

A I R 1953 S C 148
=1953 S C R 533
=1953 S C J 201.

(1147) *Description of provision—(Civil P. C. (1908), Pre.).*

It may be that the description of a provision (such as "Explanation") cannot be decisive of its true meaning or interpretation which must depend on the words used therein, but, when two interpretations are sought to be put upon a provision, that which fits the description (Explanation)" which the legislature has chosen to apply to it is, according to sound canons of construction, to be adopted provided it is consistent with the language employed, in preference to the one which attributes to the provision a different effect "(Exception)" from what it should have according to its

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description by the legislature, *State of Bombay* v. *United Motors Ltd.*,

A I R 1953 S C 252
=1953 S C R 1069
=1953 S C J 373.

(1148) Court's duty — It is the duty of the Courts to give effect to the meaning of an Act when the meaning can be fairly gathered from the words used. *Sham Rao* v. *District Magistrate, Thana*,

A I R 1952 S C 324
=1952 S C R 683
=1952 S C J 476.

(1149) *Duty of Court.*

While, no doubt, it is not permissible to supply a clear and obvious lacuna in a statute and imply a right of appeal, it is incumbent on the Court to avoid a construction, if reasonably permissible on the language, which would render a part of the statute devoid of any meaning or application. *Shiv Bahadur Singh* v. *State of V. P.* A I R 1953 S C 394.

(1150) *General and special law—(Civil P. C. (1908), Pre.).*

Per *Bhagwati J.*—A well-known rule of the interpretation of statutes is that a particular enactment is not repealed by a general enactment in the same statute. *State of Bombay* v. *United Motors Ltd.*

A I R 1953 S C 252
=1953 S C R 1069
=1953 S C J 373.

(1151) *Harmonious construction—(Civil P. C. (1908), Pre.).*

Whenever it is possible to do so, it is the duty of the Court to construe provisions which appear to conflict so that they harmonise. *Raj Krishna* v. *Binod*,

A I R 1954 S C 202
=1954 S C R 913=1954 S C J 286.

(1152) *Intention of Legislature.*

It is elementary that the primary duty of a Court is to give effect to the intention of the Legislature as expressed in the words used by it and no outside consideration can be called in aid to find that intention. *New Piece Goods Bazaar Co.* v. *I. T. Commr.*,

A I R 1950 S C 165
=1950 S C R 553=1950 S C J 437.

(1153) *Intention of Legislature—Debate on bill—Reliance on.*

Per *Patanjli Shastri J.*—A speech made in the course of the debate on a bill could at best be indicative of the subjective intent of the speaker, but it could not reflect the

inarticulate mental processes lying behind the majority vote which carried the bill. Nor is it reasonable to assume that the minds of all those legislators were in accord. The Court only search for the objective intent of the legislature primarily in the words used in the enactment, aided by such historical material as reports of statutory committees, preambles, etc. *Gopalan* v. *State of Madras*, **A I R 1950 S C 27 =1950 S C J 174=1950 S C R 88.**

(1154) *Language plain — Question of of hardship or inconvenience — Relevancy of.*

Hardship or inconvenience cannot alter the meaning of the language employed by the legislature if such meaning is clear on the face of the statute or the rules. *Commr. Agrl. I. T.* v. *Keshab Chandra*, **A I R 1950 S C 265 =1950 S C J 364=1950 S C R 435.**

(1155) Language of section obscure — Court interpreting that section in particular way—Legislature not amending that section — Legitimate inference is that view expressed by Court is in accord with intention of Legislature—Civil P. C. (1908), Pre. *Ramnandan* v. *Kapaldeo*, **A I R 1951 S C 155 =1951 S C J 199=1951 S C R 138.**

(1156) *Legislative intent—(Civil P. C. (1908), Pre.).*

It is a settled rule of construction that to ascertain the legislative intent, all the constituent parts of a statute are to be taken together and each word, phrase, or sentence is to be considered in the light of the general purpose and object of the Act itself. The title and preamble, whatever their value might be as aids to the construction of a statute, undoubtedly throw light on the intent and design of the Legislature and indicate the scope and purpose of the legislation itself. *Poppat Lal Shah* v. *State of Madras*, **A I R 1953 S C 274 =1953 S C R 677=1953 S C J 369.**

(1157) *Legislative intent — Civil P. C. (1908), Pre.*

The language used by the Legislature is the true depository of the legislative intent, and words and phrases occurring in a statute are to be taken not in an isolated or detached manner dissociated from the context, but are to be read together and construed in the light of the purpose and object of the Act itself. *Darshan Singh* v. *State of Punjab*, **A I R 1953 S C 83 =1953 S C R 319.**

(1158) *Legislative proceedings — Relevancy.*

Per *Fazl Ali J.* — It is true that legislative proceedings cannot be referred to for the purpose of construing an Act or any of its provisions, but, they are relevant for the proper understanding of the circumstances under which it was passed and the reasons which necessitated it. *Charanjit Lal* v. *Union of India*, **A I R 1951 S C 41 =1951 S C J 29=1950 S C R 869.**

(1159) *Marginal notes and heading of chapter.*

Per *Patanjali Sastri J.*—Marginal notes in an Indian statute, as in an Act of Parliament, cannot be referred to for the purpose of construing the statute. Nor can the title of a chapter be legitimately used to restrict the plain terms of an enactment: 26 All 393 (P C), *Ref. I. T. Commr.* v. *Ahmedbhai Umarbhai & Co.*, **A I R 1950 S C 134 =1950 S C J 374=1950 SC R 335.**

(1160) *Marginal Note — (Civil P. C. (1908), Pre.).*

The marginal note cannot control the meaning of the body of the section if the language employed therein is clear and unambiguous. If the language of the section is clear then it may be that there is an accidental slip in the marginal note rather than that the maginal note is correct and the accidental slip is in the body of the section itself. *Nalinakhya* v. *Shyam Sunder*, **A I R 1953 S C 148 =1953 S C R 533=1953 S C J 201.**

(1161) *Nature of enactment — Mandatory or directory.*

An enactment in form mandatory might in substance be directory. The use of the word "shall" does not conclude the matter. However, these and other rules are only aids for ascertaining the true intention of the legislature which is the determining factor, and that must ultimately depend on the context, (1880) 5 A C 214, *Ref. Hari Vishnu* v. *Ahmad Ishaque*, **A I R 1955 SC 233.**

(1162) Notification containing order made in exercise of power given force by Act —Notification has force of law—Civil P. C. (1908) Pre. *The State of Bombay* v. *F. N. Balsara*, **A I R 1951 S C 318 =1951 S C J 478=1951 S C R 682.**

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(1163) *Penal Statutes — (Civil P. C. (1908), Pre.)*

In a penal statute, it is the duty of the Courts to interpret words of ambiguous meaning in a broad and liberal sense so that they will not become traps for honest, unlearned (in the law) and unwary men. If there is honest and substantial compliance with an array of puzzling directions, that should be enough even if on some hypercritical view of the law other ingenious meanings can be devised. *Seksaria Cotton Mills Ltd.*, v. *The State of Bombay*,

A I R 1953 S C 278=1953 S C J 355 =1953 S C R 825.

(1164) *Provision when mandatory.*

A provision of a statute is not mandatory unless the non-compliance with it is made penal. *Jagan Nath* v. *Jaswant Singh*,

A I R 1954 S C 210=1954 S C J 257 =1954 S C R 842.

(1165) *Reference to existing law—(Civil P. C. (1908), Pre.)*

Per *Bose J.*—In construing a statute, it is legitimate to take into account existing laws and the manner in which they were acted upon and enforced. This rule is even more appropriate in the case of the Constitution because the Constitution itself continues in force all laws which were in existence at the date when it came into being except those which are inconsistent with itself. (1933) A. C. 156, *Rel. on. State of Bombay* v. *United Motors Limited.*

A I R 1953 S C 252=1953 S C J 373 =1953 S C R 1069.

(1166) *Retrospective operation — Civil P. C. (1908), Pre.*

Per *Kania C. J.; Patanjali Sastri; Das & Chandrasekhara Aiyar JJ.* — Every Statute is *prima facie* prospective unless it is expressly or by necessary implication made to have retrospective operation. This rule of interpretation should be applied for the purpose of interpreting our Constitution. *Keshavan* v. *State of Bombay*,

A I R 1951 S C 128=1951 S C J 182 =1951 S C R 228.

(1167) *Rules cannot save Act — (Civil P. C. (1908), Ss. 122 and 128).*

Per *Bose J.* — Rules framed under an Act cannot save the Act. Rules are made by a subordinate authority which is not the legislature. The validity of an Act of a competent legislature cannot be made to depend upon what some subordinate authority

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chooses to do or not to do. *State of Bombay* v. *United Motors Limited*,

A I R 1953 S C 252=1953 S C J 373 =1953 S C R 1069.

(1168) *Same meaning to same expression —(Civil P. C. (1908), Pre.)—(Mysore Excise Act (5 of 1901), Rules I-1 and II-10).*

The same word appearing in the same section of the same set of Rules must be given the same meaning unless there is anything to indicate the contrary. Thus, the full content of the expression "otherwise" as specified in Rule I-1 must be construed in the same sense in R. II-10 of the Rules under the Mysore Excise Act, 1901. *Guruswamy* v. *State of Mysore*,

A I R 1954 S C 592 =1954 S C J 644.

(1169) *Spirit of the Act as guide to interpretation — (Civil P. C. (1908), Preamble) —(Representation of the People Act (1951), S. 123 (7).)*

The spirit of the law may well be an elusive and unsafe guide and the supposed spirit can certainly not be given effect to in opposition to the plain language of the sections of the Act and the rules made thereunder. If all that can be said of these statutory provisions is that construed according to the ordinary, grammatical and natural meaning of their language they work injustice by placing the poorer candidates at a disadvantage the appeal must be to Parliament and not to this Court. *Ranajaya Singh* v. *Baijnath Singh*,

A I R 1954 S C 750 =1954 S C J 838.

(1170) *Statement of objects and reasons —(Civil P. C. (1908), Pre.).*

Per *S. R. Das, J.* — The statement of objects and reasons is not admissible as an aid to the construction of a statute. But it can be referred to for the limited purpose of ascertaining the conditions prevailing at the time which actuated the sponsor of the bill to introduce the same and the extent and urgency of the evil which he sought to remedy. AIR 1952 S C 369, *Rel. on. State of West Bengal* v. *Subodh Gopal Bose*,

A I R 1954 S C 92 =1954 S C J 127=1954 S C R 587.

(1171) *Statutory liability— Civil P. C. (1908), Pre.—Bombay Land Revenue Code (5 of 1879), S. 48 (2), R. 92 (obiter).*

When a liability is imposed by a statute, that liability cannot be defeated by the

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exercise of any discretion by Government or by making rules which may negative that liability.

(Where agricultural land is converted to non-agricultural use, power of the Government to make rule making it discretionary not to alter mode of assessment questioned). *Fatma Haji Ali* v. *State of Bombay*,

A I R 1951 S C 180
=1951 S C J 247=1951 S C R 266.

(1172) *Subsequent Act amending earlier one — Necessity to refer to amending Act.*

When a subsequent Act amends an earlier one in such a way as to incorporate itself, or a part of itself, into the earlier, then the earlier Act must thereafter be read and construed in such a way that there is no need to refer to the amending Act at all. *Sham Rao* v. *District Magistrate, Thana*,

A I R 1952 S C 324
=1952 S C R 683=1952 S C J 476.

(1173) *Taxing statutes — (Stamp Act (1899), Pre.).*

Per Majority *(Bose J. dissenting)* — Taxing statutes imposing tax on subjects divisible in their nature which do not exclude in express forms subjects exempted by the Constitution, should not, for that reason, be declared wholly ultra vires and void, for, in such cases, it is always feasible to separate taxes levied on authorised subjects from those levied on exempted subjects and to exclude the latter in the assessment of the tax. In such cases, the statute itself should be allowed to stand, the taxing authority being prevented by injunction from imposing the tax on subjects exempted by the Constitution. The principle is that severability in such cases includes separability in enforcement and the principle should be applied in dealing with taxing statutes: (1920) 256 U. S. 642, *Rel. on.*; A I R 1946 P. C. 66, *Distinguished. State of Bombay* v. *United Motors Ltd.*,

A I R 1953 S C 252
=1953 S C R 1069=1953 S C J 373.

(1174) *Temporary Acts — Proceedings under—When terminate.*

The general rule in regard to a temporary statute is that in the absence of special provision to the contrary, proceedings which are being taken against a person under it will *ipso facto* terminate as soon as the statute expires. *S. Krishnan* v. *State of Madras*, **A I R 1951 S C 301**
=1951 S C J 453=1951 S C R 621.

Jaipur Opium Act (1924)

(1175) *Validity of Statute — Statute opposed to spirit supposed to pervade Constitution, whether can be declared void.*

Per *Kania C. J. and Mahajan J.*—Courts are not at liberty to declare an Act void because in their opinion it is opposed to a spirit supposed to pervade the constitution but not expressed in words. Where the fundamental law has not limited, either in terms or by necessary implication, the general powers conferred upon the Legislature, Court cannot declare limitation under the notion of having discovered some thing in the spirit of the Constitution which is not even mentioned in the instrument. It is difficult upon any general principles to limit the omnipotence of the sovereign legislative power by the judicial interposition, except so far as the express words of a written constitution give that authority. If the words be positive and without ambiguity, there is no authority for a court to vacate or repeal a statute on that ground alone. But it is only in express constitutional provisions limiting legislative power and controlling the temporary will of a majority by a permanent and paramount law settled by the deliberate wisdom of the nation that one can find a safe and solid ground for the authority of the courts of justice to declare void any legislative enactment. Any assumption of the authority beyond this would be to place in the hands of the judiciary powers too great and too indefinite either for its own security or the protection of private rights. *Gopalan* v. *State of Madras*,

A I R 1950 S C 27
=1950 S C J 174=1950 S C R 88.

(1176) *War-time legislation— Interpretation—Civil P. C. (1908), Pre.*

War-time measures, which often have to be enacted hastily to meet a grave pressing national emergency in which the very existence of the State is at stake, should be construed more liberally in favour of the Crown or the State than peace-time legislation. *State of Bombay* v. *Virkumar*,

A I R 1952 S C 335
=1952 S C R 877=1952 S C J 496.

JAIPUR OPIUM ACT (1924)

(1177) *S. 1 — Act made by resolution passed by Council of Ministers — Resolution not published nor the Act — Validity of Act.*

Land Acquisition Act (1894)

The mere passing of a Resolution by a Council of Ministers (which was not a sovereign body nor functioning of its own right) purporting to enact the Jaipur Opium Act in the year 1924 without promulgation or publication in the Gazette or other means to make the Act known to the public is not sufficient to make it law. For, in the absence of some specific law or custom to the contrary, a mere resolution of a Council of Ministers in the Jaipur State without further publication or promulgation will not be sufficient to make a law operative. And as the Opium Act is not valid when made, the mere addition of a clause fourteen years later stating that it shall come into force at a date fourteen years earlier will not make the Act valid. Further S. 3 (b), Jaipur Laws Act, 1923, does not save the Act as that section only saves laws which were valid at the time and not resolutions which had never acquired the force of law: A I R (38) 1951 Rajas. 25, *Reversed. Mahajan Harla* v. *The State*,

A I R 1951 S C 467
=1951 S C J 735=1952 S C R 110.

JUDICIAL PRECEDENTS

(1178) *English decisions —(Civil P. C. (1908), Pre.).*

Supreme Court is not bound by the dicta and authority of English cases. *Chatturbhaj Vithaldas* v. *Moreshwar Parasharam*,

A I R 1954 S C 236
=1954 S C R 817.

(1179) *English decisions — Civil P. C. (1908), Pre.*

Decisions of the English Courts given under the Finance Act, the scheme of which is different from the Indian Income-tax Statutes, are not always very helpful in dealing with matters arising under the Indian law and analogies and inferences drawn from those decisions are at times misleading. *Commr. Excess Profits Tax* v. *Lakshmi Silk Mills*,

A I R 1951 S C 454
=1951 S C J 730=1952 S C R 1.

LAND ACQUISITION ACT (1894)

(1180) *Ss. 9, 10, 18 and 30 — Civil P. C. (1908), Ss. 11, 47 — Land Acquisition Proceedings — Res judicata—Decree of lower Court compromised in appeal — Applicability of S. 47, Civil P. C.—Limitation against reversioner — (Limitation Act (1908), Art. 144).*

Land Tenure

See Rajlaxmi Dasi v. *Banamali Sen*, A I R 1953 S C 33 under Civil P. C. Ss. 11, 47 (No. 119 Supra).

LAND CUSTOMS Act (1924)

(1181) *S. 7 (3)—Confiscation of goods.*

Where the High Court sets aside for conviction and sentence passed upon the accused under S. 7, it has neither the jurisdiction nor the power to confirm the order of confiscation of goods in respect of which the offence had been committed. *Krishna Pillai* v. *State of Madras*,

A I R 1954 S C 335
=1974 S C J 286.

LAND TENURE

(1182) *Ghatwali tenure — Nature of — T. P. Act (1882), S. 105.*

A Government ghatwali is a tenure created by the ruling power in favour of a person who is required to render ghatwali services to it, whereas a zamindary ghatwali is a tenure created by a zamindar for ghatwali services to be rendered to him. A Government ghatwali has been uniformly held to be inalienable. On the other hand, a zamindary ghatwali may be alienated with the consent of the zamindar, and where local custom permits, even without his consent. By the passage of time, the consent of the zamindar has ceased to be a matter of much significance, and is generally presumed when it is found that the alienation has been made without any objection from the zamindar.

Where no clear evidence is forthcoming as to the true character of the ghatwali, the fact that the tenure is included within a zamindary and is covered by the jama assessed upon it should turn the scale in favour of the party who alleges that it is a tenure which is dependent upon the zamindary. The presumption arising under the Permanent Settlement is reinforced by the entry in the Record of Rights which shows that the tenure in question is istemrari mokarari held under the zamindar. (*Held* that the party had not been able by clear and conclusive evidence to rebut the presumption arising from the Record of Rights and the record of the Permanent Settlement). *Sukhdev Singh* v. *Maharaja Bahadur*,

A I R 1951 S C 288
=1951 S C R 534=1951 S C J 386.

(1183) *Ghatwari tenure — Sanad by Captain Browne.*

Land Tenure

In order to determine the true character of a ghatwali tenure, it is usually necessary to refer to the grant by which the tenure was created. The mere fact that the sanad in a case was granted by Captain Browne cannot be held to be decisive of the nature of the tenure being Government ghatwali tenure because it seems to have been part of the duties assigned to him to confirm and recognise old titles. From the fact that Dumri ghatwali is mentioned in Captain Browne's "India Tracts" as one of the ghatwalis placed under the Collector of Jungle Terrai districts, it cannot be inferred that the ghatwali is Government ghatwali. *Sukhdeo Singh* v. *Maharaja Bahadur*,

A I R 1951 S C 288 =1951 S C R 534=1951 S C J 386.

(1184) *Ghatwali tenure — Origin and incidents of — Alienability of Ghatwali held under Zamindar of Kharakpur — Taluk Kakwara held Zamindari Ghatwali Grant.*

Ghatwali tenures held under the Zamindar of Kharakpur are by custom judicially recognised, alienable with the assent of the Zamindar while Ghatwali tenures like Handwa held under the Government direct are inalienable: *Case law referred.*

Held on the consideration of the facts and the circumstances, that Taluq Kakwara was, in its origin, a Zamindari Ghatwali tenure and continued to be so and was in fact treated as such down to the present time and further that even if by virtue of Captain Browne's Sanad it became a Government Ghatwali tenure, then under the Sanad of Raja Kadir Ali, or, at any rate, after Permanent Settlement, Taluq Kakwara became a Zamindari Ghatwali and as such was alienable with the consent of the Zamindar according to the custom of Kharakpur judicially recognized: A I R (32) 1945 Pat 339, *Affirmed.*

(The origin and the incidents of Ghatwali tenure in general and of Kakwara Ghatwali in particular considered). *Rudreshwari Prasad* v. *Rani Probhabati*,

A I R 1952 S C 1.

(1185) *Ghatwali tenure — Birbhum Ghatwalis, nature of — Succession—Joint family—Last Ghatwal dying leaving widow only — Widow succeeds in preference to male agnate — Hindu Law — Impartible Estates, succession, Birbhum Ghatwals— Regulation (29 of 1814), S. 2.*

Land Tenure

Among the Birbhum Ghatwals governed by Regulation 29 of 1814, where the last Ghatwal dies leaving a widow but no issue, she succeeds in preference to the nearest male agnate even though the family may be joint: 28 Pat 215, *Affirmed.*

Per *Mahajan and Bose JJ.*—The result of the decided cases and of the provisions of Regulation 29 of 1814 is that the grantee of the tenure and his descendants have to be maintained in possession of the land from generation to generation conditional upon services to be rendered. The tenure is however, liable to forfeiture for misconduct or misbehaviour of the ghatwal for the time being. The succession to it is determined by the rule of lineal primogeniture. It is neither partible nor alienable except in exceptional cases with the consent of the Government or the zamindar as the case may be. These two characteristics are inherent in its very nature and have not been annexed to it by any rule of custom. The estate in the hands of the last holder is not liable either to attachment or sale in execution of a decree against him; nor is it liable in hands of his successor for payment of his debts. When the succession opens out, the heir determined according to law has to execute a muchilika in favor of the grantor guaranteeing the performance of the duties annexed to the office and stipulating that in case of misconduct or misbehaviour or non-fulfilment of the obligations attaching to the office as to which the tenure is in the nature of a remuneration Government will have the right to resume it.

In view of these peculiar characteristics of a ghatwali tenure in Birbhum which are so different from other inheritance it is difficult to apply to it the law of Mitakshara to the full extent. The incidents attaching to a Birbhum ghatwali tenure rule out the existence of any notion of community of interest and unity of possession of the members of the family with the holder for the time being. He is entitled to be maintained in exclusive possession of the ghatwali lands and the devolution of the property is to him in the status of sole heir.

In Birbhum ghatwali tenures are in the nature of separate property or the exclusive property of the ghatwal and whenever succession opens out in respect of them it has to be determined according to the Mitakshara rule applicable to the devolution of separate property irrespective of the cir-

cumstance whether the deceased died in joint or separate status with the other members of the family.

The Mitakshara rule that the property inherited by a person from his immediate paternal ancestors becomes ancestral in his hands and in it his sons, grandsons and great-grandsons acquire a right at the moment of the birth has no apposite application to Birbhum ghatwali tenures.

The Regulation does not enact any rule of succession to these tenures, and the devolution with respect to them is admittedly determined by personal law or custom. The expression "descendants" used in the regulation cannot deprive females like a widow or a mother, from taking the inheritance where they are legal heirs under Mitakshara law or under custom. The expression "descendants" has been loosely employed in the regulation for the word "heirs" : 22 Cal 156, *Approved.*

Per *Fazl Ali J.*—It will not be incorrect to say that custom and usage are also important factors governing succession to ghatwali property, and it is conceivable that while in some cases custom may develop on the lines of Hindu Law relating to succession owing to repeated instances of tacit and unquestioned application of the law, in other cases succession to ghatwali property may be governed not entirely by Hindu law but by such law as modified in certain respects by usage and custom. Hindu law has been modified by custom so far as the Birbhum Ghatwals are concerned. *Hargobind Prasad* v. *Phaldani Kumari,*

A I R 1952 S C 38.

(1185A) *Underground rights — Presumption.*

A zamindar is presumed to be the owner of the underground rights in the tenancies created by him in the absence of evidence that he ever parted with them: 37 Cal 723 (P C) and 39 Cal 696 (P C), *Rel. on. Sukhdev Singh* v. *Maharaja Bahadur,*

A I R 1951 S C 288
=1951 S C R 534=1951 S C J 386.

LETTERS PATENT (BOMBAY).

(1186) *Cl. 15 — "Judgment" — (Trade Marks Act (1940), S. 76).*

A decision given by a single Judge of the High Court in an appeal preferred under S. 76, Trade Marks Act, constitutes a judgment within the meaning of Cl. 15 of the

Letters Patent. *N. S. Thread Company* v. *James Chadwick & Brothers,*

A I R 1953 S C 357.

(1187) *Cl. 15—Competency of appeal—(Trade Marks Act (1940), S. 76).*

Ordinarily after an appeal reaches the High Court, it has to be determined according to the rules of practice and procedure of that Court and in accordance with the provisions of the Charter under which that Court is constituted and which confers on it power in respect to the method and manner of exercising that jurisdiction. Thus, S. 76, Trade Marks Act, confers a right of appeal to the High Court and says nothing more about it. That being so, the High Court being seized as such of the appellate jurisdiction conferred by S. 76 it has to exercise that jurisdiction in the same manner as it exercises its other appellate jurisdiction and when such jurisdiction is exercised by a single Judge, his judgment becomes subject to appeal under Cl. 15 of the Letters Patent, there being nothing to the contrary in the Trade Marks Act, (1913) A C 546 ; A I R 1948 P C 12 and A I R 1916 P C 21, *Rel. on.* ; A I R 1951 Bom 147, *Affirmed* ; A I R 1940 P C 105, *Disting. N. S. Thread Company* v. *James Chadwick & Brothers,*

A I R 1953 S C 357.

(1188) *Cl. 15 — Purpose of reference to S. 108, Govt. of India Act, 1915—Rule of construction—(Interpretation of Statutes) —(Words and Phrases—"Vested in Court" —(General Clauses Act, (1897), S. 14).*

It is difficult to accept the argument that the power vested in the High Court under sub-s. (1) of S. 108, Government of India, Act 1915, was a limited one, and could only be exercised in respect of such jurisdiction as the High Court possessed on the date when the Act of 1915 came into force. The words of the sub-section "vested in the Court" cannot be read as meaning 'now vested in the Court'. It is a well-known rule of construction that when a power is conferred by a statute that power may be exercised from time to time when occasion arises unless a contrary intention appears. The purpose of the reference to S. 108, Government of India Act, 1915 in Cl. 15, Letters Patent, is to incorporate that power in the Charter of the Court itself, and not to make it moribund at that stage and make it rigid and inflexible. Hence S. 108, Government of India, Act, 1915, conferred power on the High Court which that Court

could exercise from time to time with reference to its jurisdiction whether existing at the coming into force of the Government of India Act, 1915 or whether conferred on it by any subsequent legislation. *N. S. Thread Company* v. *James Chadwick & Brothers*,

A I R 1953 S C 357.

(1189) *Cl. 15—Continuity of rule-making power given by the Government of India Act (1915), S. 108 — (Constitution of India, Art. 225).*

The power that is conferred on the High Court by S. 108, Government of India Act, 1915 still subsists, and it has not been affected in any manner whatever either by the Government of India Act, 1935 or by the Constitution of India. On the other hand it has been kept alive and reaffirment with great vigour by these statutes. The High Court still enjoy the same unfettered power as they enjoyed under S. 108, Government of India Act, 1915 of making rules and providing whether an appeal has to be heard by one Judge or more Judges or by Division Courts consisting of two or more Judges of the High Court. Further, the reference in Cl. 15 to S. 108 should be read as a reference to the corresponding provisions of the 1935 Act and the Constitution. *N. S. Thread Company* v. *James Chadwick & Brothers*,

A I R 1953 S C 357.

LETTERS PATENT (CALCUTTA).

(1190) *Cl. 12—Leave under—Application for revocation filed at late stage — Held, revocation not justified.*

Where the party applying for the revocation of leave granted under Cl. 12 to file a certain suit in Calcutta had not only acquiesced in the steps taken by the plaintiff to carry forward the progress of the suit incurring considerable expenses but, made use of the existence of the suit to obtain such interlocutory reliefs as he thought would be to his own advantage, at the hands of the Court at Calcutta :

Held, that the proceedings in the suit had been allowed to reach a stage where it would result in grave injustice if the Court were to hold that the forum convenient was not Calcutta but Bihar and revoke the leave on that ground. *Chittranjan* v. *Barhoo*, **A I R 1953 S C 472.**

(1191) *Cls. 15, 13 and 12—'Judgment', meaning of.*

An order for transfer of a suit made under Cl. 13, Letters Patent, is not a judgment

within the meaning of Cl. 15 and therefore is not appealable. The order neither affects the merits of the controversy between the parties in the suit itself, nor does it terminate or dispose of the suit on any ground. An order for transfer cannot be placed in same category as an order rejecting a plaint or one dismissing a suit on a preliminary ground : A I R 1920 Cal 797 (2) and A I R 1935 Rang 267 (FB), *Approved* ; *Case law discussed.*

There is a difference between an order refusing to rescind leave granted under Cl. 12 of Letters Patent and one under Cl. 13 directing the removal of a suit from one Court to another, and there is no good reason to hold that the principle applicable to one applies to the other also: 29 Bom 249 and 35 Mad 1 (FB), *Ref. Asrumati Debi* v. *Rupendra Dev*, **A I R 1953 S C 198 =1953 S C R 1159 =1953 S C J 300.**

(1192) *Cls. 16 and 44—Intent and purpose of Cl. 44.*

Clause 16 is subject to the Legislative power of the appropriate Legislature as provided in Cl. 44. So construed the last words of Cl. 16 'now in force' lose all their importance. Those words cannot be construed so as to lead an inference that the appellate jurisdiction of the High Court as specified in Cl. 16 was confined only to the jurisdiction to hear appeals from the Civil Court mentioned in that clause and appeals under Acts passed and regulations in force up to the year 1865. The true intent and purpose of Cl. 44 is to supplement the provisions of Cl. 16 and other clauses of the Letters Patent. By force of this clause appellate jurisdiction conferred by fresh legislation on the High Courts stands included within the appellate jurisdiction of the Court conferred by the Letters Patent : I L R (1946) 2 Cal 359 : A I R 1947 Cal 49 ; 51 Cal W N 42, *Overruled. N. S. Thread Company* v. *James Chadwick & Brothers*,

A I R 1953 S C 357.

LETTERS PATENT (PATNA).

(1193) *Cl. 31 — Order declining to call upon Board of Revenue to state case under S. 21, Bihar Act (VI [6] of 1944) — Appealability—Sales Tax—(Bihar Sales Tax Act (VI [6] of 1944), S. 21.)*

An order of the High Court declining to call upon the Board of Revenue to state a

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case under S. 21, Bihar Sales Tax Act, 1944, is not a final order passed in exercise of either original or appellate jurisdiction and is therefore not appealable : A I R (28) 1941 Pat 225 (SB), *Approved* ; A I R (18) 1931 Lah 138 (FB), *Disapproved*. *Prem Chand* v. *State of Bihar*,

A I R 1951 S C 14
=1950 S C R 799=1951 S C J 5.

LIMITATION ACT (1908)

(1194) *S. 3 — Special and general articles.*

When there is a specific Article in the Limitation Act which covers a particular case, it is not proper to apply another Article, the application of which is not free from doubt. *Kalipada* v. *Palani Bala*,

A I R 1953 S C 125
=1953 S C R 503
=1953 S C J 208.

(1195) *S. 10 and Art. 134B—"Assigns (not being assigns for valuable consideration)".*

The word "assign" in S. 10 is sufficiently wide to cover a lessee as well; but the benefit of that section cannot be had where the lease was for valuable consideration. The expression "valuable consideration" is not synonymous with "adequate consideration" and when that consideration namely the rent reserved, though small, was not in any sense illusory, having regard to the state of affairs prevailing at the time when the transaction took place the case would come within the terms of the exception laid down in the section and consequently the lessee would not be precluded, by reason of the fact that the property was to his knowledge a trust property, from relying on the provisions of statute which limit the time within which a suit for possession must be brought, *Gurushiddha Swami* v. *D. M. D. Jain Sabha*,

A I R 1953 S C 514
=1953 S C J 730.

(1196) *S. 14—Same relief—Proceeding for declaring judgment-debtor insolvent — Exclusion of time occupied by, whether allowed in executing decree.*

There can be no exclusion under S. 14, Limitation Act of time occupied by the insolvency proceedings against the judgment-debtor, in computing the period of limitation for executing a decree against him, as the proceedings are not for obtaining the same relief. It may by that ultimately in

Limitation Act (1908)

the insolvency proceedings the decree holder may be able to realize his debt wholly or in part, but this is a mere consequence or result. Not only is the relief of a different nature in the two proceedings but the procedure is also widely divergent. *Yeshwant* v. *Walchand*,

A I R 1951 S C 16
=1951 S C J 19
=1951 S C R 852.

(1197) *S. 18—Fraud — Suspension of limitation on general principle of equity — Whether allowed.*

The rule of equity based on general principle of jurisprudence that fraud stops or suspends the running of time can have no application where there are definite statutory provisions specifying the grounds on the basis of which alone the stoppage or suspension of running of time can arise. While the Courts necessarily are astute in checkmating or fighting fraud, it should be equally borne in mind that statutes of limitation are statutes of repose. *Yeshwant* v. *Walchand*,

A I R 1951 S C 16
=1951 S C J 19
=1951 S C R 852.

(1198) *S. 19 and Art. 64—Acknowledgment if operates as a fresh cause of action.*

Defendant H who had mutual dealings with the plaintiff, signed an entry in the plaintiff's khata (Ledger) on which earlier mutual accounts had been entered, to the following effect: "Rs. 34,000 balance due to be received up to Bhadon sudi 11 Sam. 2006 made by check and understanding of accounts with H's books". The acknowledgment was signed by H with the following endorsement. 'After adjusting the accounts Rs. 34,000 found correct and payable'. The plaintiff brought a suit on the basis of the entry for recovery of the amount :

Held that the unqualified acknowledgment contained in the entry and the statement of accounts under which the entry was made were sufficient to furnish a cause of action to the plaintiff for maintaining the suit. Truly speaking, the suit was not based merely on the acknowledgment but was based on the mutual dealings and the accounts stated between them and was thus clearly maintainable : 33 Cal. 1047 (P. C.); A. I. R. 1929 Lah. 263 and A. I. R. 1929 Lah. 264, *Ref. Hira Lal* v. *Badkulal*,

A I R 1953 S C 225
=1953 S C R 758
=1953 S C J 316.

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(1199) *S. 20, Proviso—Payment not in writing but admitted in written statement.*

It is the payment which really extends the period of limitation under S. 20 but the payment has got to be proved in a particular way and for reasons of policy the legislature insists on a written or signed acknowledgment as the only proof of payment and excludes oral testimony. Unless, therefore, there is acknowledgment in the required form, the payment by itself is of no avail. However, while the section requires that the payment should be made within the period of limitation, it does not require that the acknowledgment should also be made within that period. But while it is not necessary that the written acknowledgment should be made prior to the expiry of the period of limitation, it is essential that such acknowledgment whether made before or after the period of limitation must be in existence prior to the institution of the suit. Whether a suit is time-barred or not has got to be determined exclusively with reference to the date on which the plaint is filed and the allegations made therein. To claim exemption under S. 20, the plaintiff must be in a position to allege and prove not only that there was payment of interest on a debt or part payment of the principal, but that such payment had been acknowledged in writing in the manner contemplated by that section. The ground of exemption is not complete without this second element, and unless both these elements are proved to exist at the date of the plaint the suit would be held to be time-barred. Where none of the payments were endorsed on the bond itself and there was no acknowledgment either in the handwriting of or signed by the debtors prior to the institution of the suit, but in the written statement filed in the suit the defendants admitted the payments specified in the plaint as made on the respective dates and the written statement was signed by defendants it would not fulfil the requirements of a signed acknowledgment as is contemplated by the proviso to S. 20 : AIR (24) 1937 Cal. 284, A. I. R. (20) 1933 All. 363, 17 Mad. 92, A. I. R. (10) 1923 Nag. 117 and A. I. R. (20) 1933 Bom. 252, *Approved. Sant Lal* v. *Kamla Prasad*,

A I R 1951 S C 477
=1951 S C J 768
=1952 S C R 116.

(1200) *Art. 44—Transfer of Property—(Contract Act (1872), S. 11).*

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One S died leaving him surviving only one of his sons K and two great grandsons W and P, being grandsons of the other predeceased son M. On S's death mutation was made in 1907 in favour of K for half share and W and P together for the other half share. Later W was adopted by K. In view of this W was mutated for K. W's name was removed from the register as a co-sharer with P in respect of their father's half share. P was then shown as sole sharer of his father's half share. This was in 1920.

W then brought a suit in 1945 for a declaration against P that the property, details of which were given in the plaint, was jointly possessed and owned by the plaintiff and the defendant, the plaintiff owning $\frac{3}{4}$th share and defendant $\frac{1}{4}$th share. The case of the plaintiff was that the mutations were made during his minority completely ignoring his rights and that they were ineffectual to alter his lawful share in the properties. He pointed out that by the date of S's death he was born but not adopted and therefore he was rightly mutated in 1907 as being entitled jointly with P to the half share of their father and that his subsequent adoption by K entitled him to get K's half share in addition. He said that adoption could not divest him of the other $\frac{1}{4}$th share which he had become already entitled to as the son of his father. His case was that though the Revenue records showed his interest in the landed properties only as half and not as $\frac{3}{4}$ths, his legal rights had not in any way become altered thereby since both the parties had been in joint possession throughout until the date of suit.

Mutations were made on certain statements made by K and W. These statements were relied on by the other party as constituting transfer by K as guardian of W.

Held that the various mutations were brought about by K and that W was a minor at the time to the knowledge of everybody concerned. K intended that W should not have any share in his natural father's property. But in terms, what had been done was to get W to make a declaration of relinquishment of his share in his father's heritage. The recitals in the statements did not purport to be based on any transfer or relinquishment by K as the guardian of W. The purported release by the minor W was absolutely infructuous in law. There being nothing by way of release by K on behalf of W, no case for the application of Art. 44

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arose. The plaintiff's suit was not barred by virtue of Art. 44. *Wali Singh* v. *Sohan Singh*, A I R 1954 S C 263.

(1201) *Arts. 48, 49, 120 and 181—Application for rectification of share register. AIR 1951 Mad 572, reversed.*

Claim for rectification of register 'simpliciter' under S. 38, Companies Act — Claim does not involve claim for return of share scrips—Arts. 48 and 49 do not apply — Art. 181 which applies to applications under Civil P. C. also not applicable. Even if Art. 181 applied application held within time under that article or under Art. 120. *Sha Mul Chand & Co.* v. *Jawahar mills Limited*, AIR 1953 S C 98 =1953 S C R 351=1953 S C J 68.

(1202) *Arts. 141 and 124—Suit for possession of shebaiti right.*

There could be no doubt that there is an element in the shebaiti right which has the legal characteristics of property; but shebait ship is property of a peculiar and anomalous character, and it is difficult to say that it comes under the category of immovable property as it is known in law. A suit for possession of a shebaiti right is governed by Art. 124 and not by Art. 141. *Kalipada* v. *Palani Bala*, AIR 1953 S C 125 =1953 S C R 503 =1953 S C J 208.

(1203) *Art. 141—Suit for possession by reversioner—Limitation—(Hindu Law — Widow, nature of estate.)*

Except where a decree has been obtained fairly and properly and without fraud and collusion against the Hindu female heir in respect to a property held by her as a limited owner, the cause of action for a suit to be instituted by a reversioner to recover such property either against an alienee from the female heir or a trespasser who held adversely to her accrues only on the death of the female heir. This principle, which has been recognised in the Law of Limitation in this country ever since 1871, seems to be quite in accordance with the acknowledged principles of Hindu Law. The right of reversionary heirs is in nature of *spes successionis*, and as the reversioners do not trace their title through or from the widow, it would be manifestly unjust if they are to lose their rights simply because the widow has suffered the property to be destroyed by the adverse possession of a stranger : A I R 1929 P C 166, 23 Bom 725 (P C); 9 Cal 934 (F B) and 21 Bom 646, *Approved;*

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A I R 1925 P C 249, *Ref. Kalipada* v. *Palani Bala*, AIR 1953 S C 125 =1958 S C R 503=1953 S C J 208.

(1204) *Arts. 142 and 144—Presumption of continuance of possession.*

It had been found by the Courts below that the plaintiff was in possession of the house even during the lifetime of one Laxmi & continued in possession thereafter. Even if the tenant kept by him vacated the house and the plaintiff did not lock it, his possession would be presumed to continue till he was dispossessed by some one. The law presumes in favour of continuity of possession. The three courts below had unanimously held that on the evidence it was established that after the death of Laxmi plaintiff continued in possession of the house and the suit was within limitation. There were no valid grounds for reviewing this finding in the fourth Court. *Nathu Lal* v. *Durga Prasad*, AIR 1954 S C 355 =1954 S C J 557.

(1205) Art. 144 — Adverse possession—Permissive possession is not adverse till defendant asserts an adverse possession. *Sheodhari Rai* v. *Suraj Prasad Singh*, AIR 1954 S C 758.

(1206) *Art. 144 — Fishery rights—Acquisition by adverse possession—Riparian rights, fishery.*

Where all that appeared from the evidence was that a number of fishermen from time to time have been exercising the right of fishing with the leave and licence of some of the owners, this is not sufficient for the acquisition of the right either by adverse possession or by prescription. *Braja Sundar Deb* v. *Moni Behara*, AIR 1951 S C 247 =1951 S C J 363 =1951 S C R 431.

(1207) *Art. 182 (3), (2)—Review or appeal in collateral proceedings.*

Where after the judgment-debtor's application under S. 36, Bengal Money lenders Act, for re-opening the preliminary mortgage decree is dismissed for default a final decree is passed and subsequently the judgment-debtor makes an application under O. 9, R. 9 for restoration of proceedings under the Bengal Money-lenders Act but the same is also dismissed as also the appeal from such order of dismissal, it cannot be said that there has been a review of the final decree. If there is a review at all, it is of the order dismissing the judgment-

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debtor's application under S. 36 for default. Consequently, the execution of the final decree is not saved by Cl. (3) of Art. 182. So also the case does not come under Art. 182 (2) as appeal from the decree does not cover appeal from an order passed in a collateral proceeding or having no direct or immediate connection with the decree under execution. *Khimji Poonja & Co.* v. *Baldeo Das,* **AIR 1950 SC 7=1950 S C R 64 =1950 S C J 311.**

(1207-A) **MADHYA PRADESH ABOLITION OF PROPRIETARY RIGHTS (ESTATES, MAHALS, ALIENATED LANDS) ACT (1 of 1951).**

See Tenancy Laws.

MADRAS AGRICULTURISTS' RELIEF ACT (4 of 1938).

(1208) *Ss. 3, 8, 19—Estate sold in execution of decree— Appeal against order refusing to set aside sale—Judgment-debtor hit by S. 3, Proviso (d) before sale—Disability if ceases pending appeal—(Civil P. C. (1908), S. 65). A. I. R. 1946 Mad 337, Reversed.*

Per Fazi Ali and Mukherjea JJ.: Where an appeal is filed against an order refusing to set aside the execution sale under O. 21, R. 90, Civil P. C., no finality can be attached to the order confirming the sale, until the appeal is decided. Hence, if the judgment-debtor as owner of the property was hit by S. 3, Proviso (d) of the Madras Agriculturists' Relief Act, on the date of the execution sale, the disability does not cease till the decision of the appellate court dismissing the appeal. Hence, if the crucial date for determining whether the judgment-debtor was an agriculturist occurs between the sale and the appellate decision, it must be held that on that date the judgment-debtor continued to be the landholder of an estate and as such was excluded from the definition of an "agriculturist". It would be inconsistent to hold that while the sale put an end to the judgment-debtor's position as landholder of an 'estate', the order entering satisfaction of the decree on such sale remained inchoate. *Rama Krishna Rao* v. *Challayamma.* **A I R 1953 S C 425.**

(1209) *S. 3, Proviso, Cl. (d)—'Estate' placed in hands of receiver—Effect.*

Per Fazl Ali and Mukherjea JJ.: The owner of a property does not cease to be its owner merely because it is placed in the hands of a receiver. The true position is that the receiver represents the real owner whoever he may be, and the true owner does not by the mere appointment of a receiver cease to be a landholder of an estate under the Madras Estates Land Act. *Rama Krishna Rao* v. *Chellayamma.* **A I R 1953 S C 425.**

Madras Agriculturists' Relief Act (1938)

(1210) *S. 3 (ii) (a) and (b)—Interest of judgment-debtor to have sale set aside if one contemplated by S. 3 (ii) (a) and (b).*

Per Chandrasekhara Aiyar J.: After sale in execution of a mortgage decree, the only interest which the judgment-debtor has in the property sold, is to have the sale set aside under Civil P. C. This interest is not the interest contemplated by S. 3 (ii) (a) and (b) which speaks of saleable interest or interest as a tenant, ryot or under-tenure holder. *Rama Krishna Rao* v. *Chellayamma.* **A I R 1950 S C 425.**

(1211) *S. 7—Scaling down—Pre-requisite.*

The essential pre-requisite to the application of the provisions relating to scaling down is the existence of a debt payable by an agriculturist on the date when the Act commenced, that is to say, on 22nd March 1938.

It is not necessary that the applicant for relief himself should be liable for the debt on the date that the Act came into force. The right to claim relief is not confined to the person who originally contracted the debt, but is available to his legal representatives and assigns as well; nor is it necessary that the applicant should be personally liable for the debt. The liability of a purchases of the equity of redemption to pay the mortgage debt undoubtedly arises on the date of his purchase; but the debt itself which has its origin in the mortgage bond did exist from before his purchase, and if it was payable by an agriculturist at the relevant date, the purchaser could certainly claim the privileges of the Act if he himself was an agriculturist at the date of his application. *Nageshwar Swami* v. *Vishwasundra.* **A I R 1953 S C 370 =1953 S C R 894 =1953 S C J 539.**

(1212) *Ss. 7, 14 — Mortgage decree — Scaling down against some judgment-debtors —Indivisibility of mortgage debt if affected —T. P. Act (1882), S. 60.*

Madras Agriculturists' Relief Act (1938)

Though under the general law, a mortgage decree is one and indivisible subject to certain recognised exceptions, the Madras Agriculturists' Relief Act which is a special statute intended to give relief only to agriculturists trenches upon the general law in so far as it expressly provides that a debt owing to an agriculturist shall be scaled down under the Act. Thus, in case of a mortgage debt when the loan has been advanced to more than one person, if one of the debtors happens to be an agriculturist while others are not, the agriculturist debtor would certainly be entitled to have his debts scaled down under the provisions of the Act in spite of the provision of general law which prevents a mortgagor from denying the liability of the interest which he owns in the mortgaged property to satisfy the entire mortgage debt. There is, therefore, nothing wrong in law in scaling down a mortgage decree in favour of one of the judgment-debtors, while as regards others the decree is kept intact. *V. Ramaswami* v. *Kailasa Thevar.*

A I R 1951 S C 189=1951 SC J 278 =1951 S C R 292.

(1213) *S. 19— Mortgage decree against several co-mortgagors—Decree scaled down against all except one—Effect—Judgment-debtor against whom it is not scaled down if can claim benefit of scaled down decree —Civil P. C. (1908), O. 21, R. 2.*

A preliminary mortgage decree was passed against seven persons on the basis of a mortgage executed by defendant 1 on behalf of himself and other defendants. On application by defendants 2 to 7, the decree was scaled down only against them while it remained intact as against defendant 1 who did not apply. The final decree passed accordingly directed defendants 2 to 7 to pay into Court the amount of decree as scaled down on payment of which the plaintiff, was to bring into Court all documents in his possession & reconvey the property if so required. The decree expressly directed defendant 1 to pay the entire amount as originally decreed on payment of which only the redemption of the mortgaged property would be allowed. In execution of the decree defendants 2 to 7 deposited certain amounts in Court towards the decretal debt as scaled down. Defendant 1 subsequently deposited the balance of the decretal amount as scaled down and applied for entering up full satisfaction of the decree and release of entire mortgaged property in accordance with terms of decree passed against defendants 2 to 7:

Held, that the decree should not only have stated the amount payable by defendant 1 and that by defendants 2 to 7 separately but should have expressly directed that on payment of the amount directed to be paid by defendants 2 to 7 their interest alone in the mortgage property would not be liable to be sold. The further direction should have been that in case they did not pay this amount, the whole of the mortgaged property including their interest would be sold for the entirety of the mortgage debt for which defendant 1 was made liable. *V. Ramaswami* v. *Kailasa Thever.*

A I R 1951 S C 189 =1951 SCJ 278=1951 S C R 292.

MADRAS DISTRICT POLICE ACT (24 of 1859).

(1214) *S. 44 — Cessation to perform duties—(Evidence Act (1872), Ss. 101 to 103).*

The prosecution has to make out that the cession of accused from duty was intentional under Section 44. No doubt in an ordinary case where no other special circumstances appear on the record, the Court might well assume that cessation as a fact was intentional cessation. But where other circumstances appear, the requisite intention has to be clearly made out. *S. A. A. Biyabani* v. *The State of Madras.*

A I R 1954 S C 645.

MADRAS ELECTRICITY SUPPLY UNDERTAKINGS (ACQUISITION) ACT (43 of 1949).

(1215) *Validity—(Government of India Act (1935), Ss. 104 and 299 (2)).*

Although Parliament expressly entrusted the Provincial Legislature with power to make a law with respect to compulsory acquisition of land, it did not straightaway grant any power, either to the Federal Legislature or the Provincial Legislature, to make a law with respect to compulsory acquisition of a commercial or industrial undertaking but left it to the discretion of the Governor-General to empower either of the Legislatures to enact such a law. There being no suggestion that the Governor-General had, in exercise of his discretionary powers under S. 104, authorised the Madras Legislature to enact the impugned Act, it

Madras Electricity Supply Undertakings (Acquisition) Act (1949)

Madras Estates Land Act (1908)
must be held that the Madras Legislature had no legislative competency to enact that Act. A I R 1951 Mad 979, Reversed. *R. E. C. Corporation* v. *State of Andhra.*

A I R 1954 SC 152.

(1215-A) MADRAS ESTATES LAND ACT (1 of 1908)

See Tenancy Laws.

(1215-B) MADRAS GENERAL SALES TAX ACT (1939)

See Sales Tax.

MADRAS HINDU RELIGIOUS ENDOWMENTS ACT (2 of 1927)

(1216) *S. 73—Equitable considerations (Hindu Law — Religious Endowment — Suit).*

In a proceeding for the framing of a scheme relating to a temple it may be permissible to take into account the claims, moral if not legal of the Archakas and to make some provision for protecting their rights, but those considerations are entirely out of place in a suit for ejectment on proof of title. The conduct of the Archakas in asserting an adverse right in the face of the honest admission of their predecessors-in-title made in the Inam statement, disentitle them from any claim founded on equity. Further, the giving of equitable relief must depend on questions of fact, namely, the income of the property, the reasonable expenses and remuneration for the services, the amounts appropriated by them and so forth. Appeals No. 218 of 1946 and No. 709 of 1944 (Mad), *Disting. Satyanarana* v. *Venkatapatayya,*

A I R 1953 S C 195
=1953 S C J 283.

MADRAS HINDU RELIGIOUS AND CHARITABLE ENDOWMENTS ACT (19 of 1951)

(1217) *S. 1—Validity of certain provisions of Act—Sections 21, 30 (2), 31, 55, 56 and 63 to 69 of the Madras Hindu Religious and Charitable Endowments Act, 1951 are invalid as conflicting with the fundamental rights of the Mathadhipati of a Math and S. 76 (1), which imposes a tax and not a fee is void as beyond the legislative competence of the Madras State Legislature. The rest of the Act is valid.*

Merchant Shipping Act (1923)
(*Note*: In addition to the sections mentioned above, the High Court had, in the decision reported as 'AIR 1952 Mad 613', held the following sections of the Act also invalid namely, Ss. 18, 20, 23, 24, 25, 26, 28, 29 (2), 39, 42, 53, 54, 58, 59, 70, 89, 99. Of these the Supreme Court held that Ss. 18, 39 and 42 need not be considered as they were not applicable to Maths. Overruling the opinion of the High Court, the remaining sections were held valid by the Supreme Court. *Commr. H. R. E.* v. *L. T. Swamiar,*

A I R 1954 S C 282
=1954 S C J 335.

MASTER AND SERVANT

(1218) *Principal and agent—Possession when of Master or Principal.*

For possession of servant or agent to be judicially regarded as that of Master or Principal the servant or agent must be amenable to the directions of the Master or Principal. If Master or Principal has no hold or power in appointment or dismissal, possession cannot be regarded as of Master or Principal. *Chiranji Lal Choudhary* v. *Union of India,*

A I R 1951 S C 41
=1951 S C R 869.

MERCHANT SHIPPING ACT (1923)

(1219) *S. 25 — Issue of muster card to seamen does not amount to 'supply' of seamen within S. 25.*

Neither the Calcutta Maritime Board nor the Calcutta Liners' Conference supply the seamen. The registration entitles the seamen to get muster cards which enable them to appear at the musters and there, the Captains of the ships select and engage the seamen. It is after this selection and engagement that the body of ship-owners, called the Calcutta Liners' Conference, pay Rs. 2 to the Calcutta Maritime Board out of which Re. 1 is their own contribution and Re. 1 is the contribution by the seaman which is deducted from his wages. There is, therefore, no supply of a seaman within the meaning of S. 25. To a certain extent, the recruitment is regulated by the Maritine Board but it is a misnomer to say that the seamen are supplied to the owners by the Board or by any of its officers. *Stephens* v. *Nosibolla,*

A I R 1951 S C 196
=1951 S C J 269
=1951 S C R 284.

MINIMUM WAGES ACT (1948)

(1220) *Ss. 3, 4 and 25 — Validity of provisions—(Constitution of India, Art. 19 (1) (g) and (6)).*

It can scarcely be disputed that securing of living wages to labourers which ensure not only bare physical subsistence but also the maintenance of health and decency, is conducive to the general interest of the public. This is one of the Directive Principles of State Policy embodied in Art. 43 of the Constitution. The material provisions of the Minimum Wages Act are not therefore illegal and ultra vires, as the restrictions imposed by them, though they interfere to some extent with the freedom of trade or business guaranteed under Art. 19 (1) (g) of the Constitution, are reasonable and being imposed in the interest of the general public are protected by the terms of clause (6) of Art. 19. *Bijay Cotton Mills Ltd.* v. *State of Ajmer,*

A I R 1955 S C 33.

(1221) *S. 5 (1) (a) — Minimum Wages Rules, Rule 3—Power to extend period fixed for report of committee.*

Rule 3 of the rules framed under section 30 of the Act expressly lays down that the State Government may fix the term of the committee when it is constituted and may from time to time extend it as circumstances require. The State Government has, therefore, a right to extend the term of the committee in such way as it likes. It can do so after the period originally fixed has come to an end so as to revive it. And assuming that the order cannot revive a committee which is already dead, it can be held that a new committee is constituted on that date and even then the report submitted by it will be a perfectly good report. Further, it is to be noted that a committee appointed under Section 5 of the Act is only an advisory body and that the Government is not bound to accept any of its recommendations. Consequently, procedural irregularities of this character cannot vitiate the final report fixing the minimum wages. *Edward Mills Company* v. *State of Ajmer,*

A I R 1955 S C 25.

MOTOR SPIRIT RATIONING ORDER (1941)

(1222) *Cl. 22— Liability of master for acts of servant.*

Clause 22 is not aimed specifically against a supplier but is general in its language, and will hit the individual person, whether he be the supplier or not who contravenes the provision. The language ot the Clause also suggests that only the person who furnishes motor spirit contrary to the provisions of the Order will be affected by the contravention. The language of Cl. 22 does not lend support to the contention that even an innocent master will be criminally liable for an act of his servant: A. I. R 1947 P. C. 135, *Rel. on.*; A. I R. 1948 Bom. 364, *Apprved. Hari Prasada Rao* v. *The State,*

A I R 1951 S C 204=1951 S C J 296 =1951 S C R 322.

(1223) *Cl. 27A — Liability of master for acts of servant.*

Clause 27A throws the responsibility for making the necessary endorsement on the supplier. If, Cl. 27A is contravened, a person who comes within the definition of the word 'supplier' must be held guilty of the contravention. The object of this clause clearly is that the supplier of petrol should set up a complete machinery to ensure that the necessary endorsements are made on the coupons against which petrol is supplied. It is conceivable that in many cases the default will be committed by the servants of the supplier, who are in charge of the petrol pump, but that fact by itself will not exonerate the supplier from liability. *Case law Ref. Hari Prasada Rao* v. *The State,*

A I R 1951 S C 204=1951 S C J 296 =1951 S C R 322.

(1224) *S. 42 — Bengal Motor Vehicles Rules, Rule 179—Option of taxi owner to charge below prescribed minimum.*

Rule 179 which prescribes the minimum tariff for the different classes of taxis does not prohibit the charge of a rate below the prescribed minimum if the taxi owner so wishes. All that it enjoins is that a tariff higher than the fixed minimum cannot be charged and that the hirer of a taxi on demand is bound to pay at that rate. *Haruam Singh* v. *R. T. A. Calcutta Region,*

A I R 1954 S C 190=1954 S C J 46 =1954 SCR 371.

MOTOR VEHICLES ACT (1939)

(1225) *S. 46—Permits — Ownership of bus—Necessity.*

The issue of a permit for a bus which falls within the definition of a "stage car-

Motor Vehicles Act (1939)

riage" is not dependent on the ownership of the vehicle. All that is required for obtaining a permit is possession of the bus. *Veerapa Pillai* v. *Raman & Raman Limited*, **A I R 1952 SC 192 =1952 S C J 261=1952 S C R 583.**

(1226) *S. 68 (1) and (2) (r) and (3-a) —Rules under — Madras Vehicles Rules (1940), R. 268—Validity.*

Rule 268 is within the scope of the powers conferred under S. 68 of the Act.

Though a by-law must not be repugnant to the statute or the general law, by-laws and rules made under a rule-making power conferred by a statute do not stand on the same footing, as such rules are part and parcel of the statute itself. Rule 268 therefore cannot be challenged as being void because it is not consistent with some general law. *T. B. Ibrahim* v. *Regional Transport Authority*,

A I R 1953 S C 79 1953 S C R 290=1953 S C J 31.

(1227) *S. 68 (2) (r) — Rules under — Madras Vehicles Rules (1940), R. 268— Consultation with Municipality—Municipality partisan to dispute.*

Where the Transport Authority consulted the Municipality before passing the order whereby it altered the starting places and termini of all public service vehicles from the bus-stand owned by the appellant to the Municipal bus-stand.

Held that in consulting the Municipality the Transport Authority did not act otherwise than within the scope of its powers.

Held further that according to the language employed by R. 268 the consultation is not obligatory but only discretionary. *T. B. Ibrahim* v. *Regional Transport Authority*,

A I R 1953 S C 79 =1953 S C R 290=1953 S C J 31.

(1228) *S. 68 (2) (r) — Rules under — Madras Vehicles Rules Authority shifting bus-stand from one place to another—Mala fides — District Collector presiding over meeting of Transport Authority and also opening Municipal bus-stand—Validity of resolution.*

The mere fact that in the first notice certain grounds were mentioned which were not adhered to in the second notice and convenience of the travelling public was alone mentioned as the ground could not lead to the inference that the order was mala fide.

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Where the District Collector was acting, purely in his executive capacity, his conduct in presiding over the meeting of the Transport Authority in the exercise of his normal functions and also opening the Municipal stand, which he was entitled to do as the head of the District does not affect the validity or fairness of the order. *T. B. Ibrahim* v. *Regional Transport Authority*,

A I R 1953 S C 79 1953 S C R 290=1953 S C J 31.

(1229) *S. 68 (2) (r) Rules under—Madras Vehicles Rules—Authority shifting bus-stand from one place to another — Mala fides — District Collector presiding over meeting of Transport Authority—Validity of resolution.*

The mere fact that in the first notice certain grounds were mentioned which were not adhered to in the second notice and convenience of the travelling public was alone mentioned as the ground could not lead to the inference that the order shifting bus-stand from one place to another was mala fide.

Where the District Collector was acting purely in his executive capacity his conduct in presiding over the meeting of the Transport Authority in the exercise of his normal functions and also opening the Municipal stand, which he was entitled to do as the head of the District, does not affect the validity or fairness of the order. *T. B. Ibrahim, Proprietor, Bus Stand Transport* v. *The Regional Transport Authority, Tanjore*,

A I R 1953 S C 79 =1953 S C R 290=1953 S C J 31.

(1230) *S. 68 (2) (r) — Rules under — Madras Vehicles Rules (1940), R. 268 — Consultation with Municipality— Effect.*

Where the Transport Authority consulted the municipality before passing the order whereby it altered the starting places and termini of all public service vehicles from the bus-stand owned by the appellant to the Municipal bus-stand. Held that in consulting the Municipality the Transport Authority did not act otherwise than within the scope of its powers.

Held further that according to the language employed by R. 268 the consultation is not obligatory but only discretionary. *T. B. Ibrahim, Proprietor, Bus Stand Tanjore* v. *The Regional Transport Authority, Tanjore*, **A I R 1953 S C 79 1953 S C R 290=1953 S C J 31.**

Muhammadan Law

(1231) *S. 68 (2) (r) — "Duly notified stands"—(Municipalities — Madras District Municipalities Act (5 of 1920), S. 270 (b), (c) and (e)).*

A duly notified stand must be one which is notified by the Transport Authority and by none other. There is no warrant for the presumption that it must be notified by the Municipality. Sub-sections (b), (c) and (e) of S. 270, District Municipalities Act do not affect the power of the Transport Authority to regulate traffic control or impose restrictions upon the licence of any stand. *T. B. Ibrahim* v. *Regional Transport Authority*,

A I R 1953 S C 79
1953 S C R 290=1953 S C J 31.

MUHAMMADAN LAW

(1232) *Dower Debt—Priority.*

A dower debt cannot be given any priority over other debts on any equitable consideration or on the ground that there is something inherent in its very nature which entitles it to priority. A claim for unpaid dower constitutes a debt payable 'pari passu' with the demands of other creditors and is not a preferential charge on the estate. A widow in possession of her husband's estate in lieu of her claim for dower with the consent of the other heirs or otherwise is not entitled to priority as against his other unsecured creditors. There is nothing repugnant or inequitable according to the principles of Muhammadan Law in the estate of a deceased Muslim being rateably distributed between the unsecured creditors. 25 Mad 658 *Approved. Kapoor Chand* v. *Kidar Nissa*,

A I R 1 R 1953 S C 413.

(1233) *Guardianship—De facto guardian — Transfer of minor's property by way of family settlement by brother as guardian — Validity — (Contract Act (1872), S. 11).*

Under the Muhammadan Law a person who has charge of the person or property of a minor without being his legal guardian, and who may, therefore, be conveniently called a "de facto guardian," has no power to convey to another any right or interest in immovable property which the transferee can enforce against the infant.

A deed of family settlement to which a Muhammadan minor is a party represented by his brother as de facto guardian is void and not binding on the minor, irrespective of the consideration that it benefited him or the arrangement was followed for a long period: A I R 1918 P C 11, *Foll.;* 23 Cal W N 118; A I R 1919 Cal 218; 49 Ind Cas 886 and 6 Oudh W N 51; A I R 1929 Oudh 134; 117 Ind Cas 456, *Overruled;* A I R 1938 P C 181, *Ref.*

A deed of settlement which is thus void qua the minor is void altogether qua all the parties including those who were *sui juris. Mohammad Amin* v. *Vakil Ahmed*,

A I R 1952 S C 358=1952 S C R 1133
= 1951 S C J 539.

(1234) *Marriage — Presumption of — When arises — Held on facts that there was presumption of lawful marriage.*

If there was no insurmountable obstacle to their marriage and the man and woman had cohabited with each other continuously and for a prolonged period, the presumption of lawful marriage would arise and it would be sufficient to establish that there was a lawful marriage between them:

Held that the circumstances raised the presumption of lawful marriage between the father and the mother of the plaintiffs. *Mohammad Amin* v. *Vakil Ahmed*,

A I R 1952 S C 358=1952 S C R 1133
= 1951 S C J 539.

MUNICIPALITIES

C. P. AND BERAR MUNICIPALITIES ACT (II [2] OF 1922)

(1235) *S. 66 (1) (e)—Octroi tax under—Validity of—Tax does not amount to excise duty under Central Act I (1) of 1944 — Excise duty and octroi duty, distinction—Central Excises and Salt Act (I [1] of 1944), Sch. I, item 9—Government of India Act (1935), Ss. 143, 292, Sch. VII, List 1, Item 45, List II, Item 49.*

An octroi duty levied under S. 66 (1) (e), C. P. and Berar Municipalities Act, 1922, comes within the exact wording of Entry 49 of List II of Sch. VII, Government of India Act, 1935. *Prima facie*, therefore, there is no reason to consider the levy of the duty under the Provincial Legislation invalid, such levy being unaffected by reason of S. 292 of the Act of 1935.

Where in the Constitution Act there are two complementary powers each expressed

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in precise and definite terms, there can be no reason for giving a broader interpretation to one power rather than to the other; and there is certainly no reason for extending the meaning of the expression "duties of excise" at the expense of the Provincial power to levy certain taxes: A I R 1942 F C 33, *Rel. on.*

Excise duty is a tax on manufactured goods. Octroi duty is a tax levied on the entry of goods within a particular area. Tobacco becomes subject to excise duty when it reaches the stage of manufacture mentioned in Item 9 of the Schedule to the Excise Act. Even before it is converted into *bidis* or any other article mentioned in the entry it has become excisable goods and liable to pay excise duty. The levy of such duty is therefore not in conflict with the levy of an impost on the entry of the goods within a certain area.

Entry 49 in List II of Sch. VII, Government of India Act, does not conflict with Entry 45 in List I. A comparison with Entry 45 in List I shows distinctly that Entry 45 is limited to excise duty and is not wide enough to cover tobacco or other goods generally for all purposes of legislation.

It is wrong to think that two independent imposts arising from two different sets of circumstances were not permitted in law. There is therefore nothing in the Excise Act to make its provisions contrary to the provisions of S. 66 (1) (e), Central Provinces Municipalities Act, or to the levy of octroi duty under the same. *Ramkrishna Ramnath* v. *Kamptee Municipality*,

A I R 1950 S C 11
=1950 S C J 148
=1950 S C R 15.

MYSORE TOWN MUNICIPALITIES ACT (22 of 1951)

(1236) *S. 14 (1) (A) (a) (iii) — Office of profit—Holding office of Chairman of Taluk Development Committee.*

A person holding the office of Chairman of Taluk Development Committee cannot be said to be holding an office of profit under the Government and is consequently not subject to any disqualification for being elected a Councillor. *Ravanna Subana* v. *G. S. Kaggeerappa*,

A I R 1954 S C 653.

(1237) *S. 14 (3) — Scope.*

The words "whether a vacancy has occurred under this section" apparently cover both cases of an antecedent or a subsequent disqualification. *Ravanna Subana* v. *G. S. Kaggeerappa*, **A I R 1954 S C 653.**

(1238) *Ss. 14 and 20— Election in contravention of S. 14—Setting aside of.*

Where a person is elected as a Councillor in contravention of the provisions relating to disqualification as contained in S. 14, the election of such a councillor automatically becomes void without requiring it to be set aside by an election petition under S. 20 of the Act. At any rate, if the seat becomes vacant and if under sub-s. (3) of S. 14 the Government is made the final authority to determine such disputes, it would be unreasonable to hold that the same matter could be also agitated before the Election Commissioner under S. 20, with the attendant risk of a conflict of decision between the two authorities. *Ravanna Subana* v. *G. S. Kaggeerappa*, **A I R 1954 S C 653.**

ORISSA MUNICIPAL ACT (23 of 1950)

(1239) *Ss. 1 (3) and (5) and 16 (1) (ix) — Nomination paper filed before Act came into operation — Rejection of, under S. 16 (1) (ix) — (Orissa General Clauses Act (1 of 1937), S. 23).*

There is contemplated under the very provisions of S. 1 (5) the holding of elections under the Act in spite of the fact that the Act had not come into force in a particular area. Ordinarily the statute enacted by a State legislature comes into force as soon as it receives the assent of the Governor. Section 1 (3) of the Act however postpones the commencement of the Act which means that S. 1 (3) came into operation immediately the Governor gave his assent to the Act. Section 1 (5) is nothing but a proviso to

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S. 1 (3) and must be regarded also to have come into operation simultaneously with S. 1 (3). Section 1 (5) having thus come into force at once on the Act having received the assent of the Governor on the 7th November 1950, if elections were to be held under the Act before the rest of the Act came into force in any particular area, all incidental steps for the holding of such elections were certainly contemplated to be taken and those steps which would be thus taken in anticipation of the Act coming into force in a particular area were certainly authorised by the terms of S. 1 (5) by necessary implication, because no elections could be held unless all the preliminary steps for holding the same were taken. The clear provisions of S. 1 (5) of the Act expressly empowered the State Government to hold elections and thereby validated all the preliminary steps taken for the purpose of holding such election, the only reservation made being that even though the election under the Act be held such election was not to take effect till the Act came into force in the particular area.

Where, therefore, the Government decided to hold elections as provided by the Act in a Municipality on 20-4-51 and 15-3-51 was fixed as the date for filing the nominations and the appellant who filed his nomination paper was a legal practitioner residing within the limits of the said Municipality and was employed as a legal practitioner against the Municipality and the Act came into operation in the Municipality on 15-4-1951:

Held that though the Act had not come into operation in the Municipality till 15-4-1951, the disqualification prescribed by S. 16 (1) (ix) was incurred by the appellant on 15-3-1951 when he filed his nomination paper which could, therefore, be legally rejected and the defect could not be cured by S. 23, Orissa General Clauses Act.

Sukhawant Ali v. *State of Orissa*,

A I R 1955 S C 166.

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U. P. MUNICIPALITIES ACT (2 of 1916)

(1240-1241) *S. 294—Scope.*

A fee of one anna per rupee to be shared equally by the buyer and the seller cannot possibly be regarded as fee contemplated by by S. 294. Hence the revised bye-law 8 (c) framed by the Notified Area Committee Khatauli cannot be supported under S. 294.

Sri Ram v. *Notified Area Committee, Khatauli*,

A I R 1952 S C 118.

MYSORE EXCISE ACT (5 of 1901)

(1242) *S. 16 and R. I-1 and II-8 — Liquor licencing in Mysore State—Essential conditions—Improper cancellation of bid—Remedy by way of writ — (Constitution of India, Art. 32).*

The Mysore Excise Act, 1901 and the Rules made thereunder make it plain that liquor licencing in the State of Mysore can only be done in certain specified ways and such discretion as is left to the authorities is strictly controlled by Statute and Rules.

The rules do not tie down the authorities to the method of auction and tender; nor are they bound to follow R. I-2 as an alternative. They have a discretion under R. I-1 and can act "otherwise". But if they wish to do that, then it is essential that due notice and publicity be given of the "otherwise" method in a Government notification as R. I-1 directs. The matter cannot be left to the arbitrary discretion of some lessor authority.

A liquor contract was knocked down in an auction by the Deputy Commissioner in favour of A who was the highest bidder. B who was present at the auction but did not bid, saw the Excise Commissioner and offered Rs. 5000/- in excess of A's bid. B's offer was accepted and A's bid was cancelled. Subsequently the Deputy Commissioner informed A of the cancellation and accepted B's bid under Excise Commissioner's orders. In an appeal against the order;

Mysore House Rent and Accommodation Control Order (1948)

Held that the cancellation, though irregular was proper and as A obtained no right to the licence by the mere fact that the contract had been knocked down in his favour (the acceptance being subject to sanction), the first relief asked by A for a 'mandamus' to confirm his right to the licence for 1953-54 could not be granted.

(ii) that the action of Deputy Commissioner in giving contract to B was wrong as it ran counter to the policy of the legislature which is that matters of such consequence to the State revenue cannot be dealt with arbitrarily and in the secrecy of an office.

(iii) that in ordinary course A would have been given the writ he sought, but as it would be ineffective due to the expiry of the contract year, and as it was not the practice of the Supreme Court to issue meaningless writs, no writ was issued and the appeal was dismissed. *Gurusmamy* v. *State of Mysore*,

A I R 1954 S C 592=1954 S C J 644.

MYSORE HOUSE RENT AND ACCOMMODATION CONTROL ORDER (1948)

(1243) *Cl. 3 (2), (4) and (6) — Allotment order made before Constitution came into force—Applicability of Arts. 19 (1) (f) and 31 (2) —(Constitution of India, Arts. 19 (1) (f) and 31 (2).)*

Where the order of allotment of a house was made before the Constitution came into force and at a time when the Control Order provided, validly, that a house could be taken for the occuption of a private individual; but the dispossession of the landlord took place after the Constitution came into force:

Held, that Arts. 19 (1) (f) and 31 (2) did not apply to the case and the fact that dispossession took place after the coming into force of the Constitution was immaterial as the dispossession was a mere consequence which followed under Cl. 3 (6) of the Control Order.

Mysore Legislature (Prevention of Disqualifications) Act (1951)

Held further that Art. 31 (2) did not apply also because there was no acquisition by the State of the house. The taking of possession can only be from a person who is entitled to possession. The landlord lost his right to possession by reason of the Controller's order. As soon as the allotment was made, the allottee became a tenant and the owner became the landlord by reason of sub-cl. 4 of the Control Order. *D. K. Nabhirajiah* v. *State of Mysore*,

A I R 1952 S C 339 =1952 S C R 744=1952 S C J 490.

(1244) *Cl. 3 (2)—Words "for the purposes" can be read to include "occupation" also.*

There is no antithesis between "for the purposes of the Government of Mysore", etc., and "for the occupation of any officer" etc., in cl. 3 (2). The words "for the purposes" can be so read as to include "occupation" also. *D. K. Nabhirahiah* v. *State of Mysore*, **A I R 1952 S C 339 =1952 S C R 744=1952 S C J 490.**

MYSORE LEGISLATURE (PREVENTION OF DISQUALIFICATIONS) ACT (25 OF 1951)

(1245) *S. 2—Office of profit.*

The implication of the provision is not that the offices mentioned in the schedule must necessarily be regarded as offices of profit, irrespective of the fact whether any profit is at all attached to them or not and that but for these provisions the persons holding them could not have been eligible for being chosen as members of the Legislature. *Ravanna Subana* v. *G. S. Kaggeerappa*, **A I R 1954 S C 653.**

(1246) *S. 7.—Cases pending on 26-1-50 —(Constitution of India, Art. 14).*

Trial under Mysore Special Criminal Courts Act (24 of 1942) — Convictions on 5-10-49 by Special Judge — One accused awarded death and other lesser sentences—

MYSORE SPECIAL CRIMINAL COURTS ACT (24 OF 1942)

Others awarded sentences of transportation and lesser sentences — Cases submitted to single Judge of High Court for review under S. 7 (a) and pending on 26-1-1950—Held right of appeal, if any, against the convictions and sentences of transportation for life and less had already become barred before the Constitution came into force and this right could not be revived after the Constitution—Sentence of death reduced to transportation for life. *Abdul Khader* v. *State of Mysore*, **A I R 1953 S C 355 =1953 S C J 468.**

NEGOTIABLE INSTRUMENTS ACT (1881)

(1247) *Ss. 7 and 32—Acceptance—Validity.*

Section 7 of the Negotiable Instruments Act following the English law, provides that the drawee becomes an acceptor, when he has signed his assent upon the bill. In view of these provisions, there cannot be, apart from any mercantile usage, an oral acceptance of the hundi much less an acceptance by conduct, where at least no question of estoppel arises. Hence, the mere fact of possession of a bill by the drawee is not sufficient to constitute valid acceptance.

What is requisite for fixing the drawee with liability under S. 32 is the acceptance by him of the instrument and not an acknowledgment of liability. As the law prescribes no particular form for acceptance, there should be no difficulty in construing an acknowledgment as an acceptance but then, it must satisfy the requirements of S. 7, and must appear on the bill and be signed by the drawee. Assuming that a plea of discharge of a hundi implies an acknowledgment of liability thereunder that is not sufficient to fix the liability on the drawee under S. 32 when the acknowledgment is neither in writing nor signed by him. *Jagjivan Mavji* v. *Ranchhoddas Maghji*, **A I R 1954 S C 554 =1954 S C J 526.**

(1248) *Ss. 31, 32, 61 and 64 — Bill of exchange payable on demand or after sight —Acceptance of drawee is essential for fixing him with liability on instrument.*

The drawee of a negotiable instrument is not liable on it to the payee, unless he has accepted it. Under S. 32, the liability of the drawee arises only when he accepts the bill. There is no provision in the Act that the drawee is as such liable on the instrument, the only exception being under S. 31 in the case of a drawee of a cheque having sufficient funds of the customer in his hands; and even then, the liability is only towards the drawer and not the payee.

In a bill payable after sight, there are two distinct stages, firsty when it is presented for acceptance, and later when it is presented for payment. Section 61 deals with the former and S. 64, with the latter. Presentment for acceptance must always and in every case precede presentment for payment. But when the bill is payable on demand, both the stages synchronise, and there is only one presentment, which is both for acceptance and for payment. When the bill is paid, it involves an acceptance; but when it is not paid, it is really dishonoured for non-acceptance. But whether the bill is payable after sight or at sight or on demand, acceptance by the drawee is necessary before he can be fixed with liability on it. It is acceptance that establishes privity on the instrument between the payee and the drawee. 3 Bom 182; 20 Bom 133, *Rel. on. Jagjivan Mavji* v. *Ranchhoddas, Maghji*, **A I R 1954 S C 554 =1954 S C J 526.**

(1249) *Ss. 61 and 78 —Presentment for payment — Validity.*

In the case of a bill (hundi) payable at sight both the stages for presentment for acceptance and for payment are rolled up into one and, therefore, the person who is entitled to receive the payment under S. 78 of the Act is the person, who is entitled to present it for acceptance. Under Section 78, the payment must be to the holder of the instrument, and if a person having no authority to receive the amount on behalf of the payee presents it and receives payment there is no valid presentment of the hundi by him for acceptance. *Jagjivan Mavji* v. *Ranchhoddas Maghji*, **A I R 1954 S C 554 =1954 S C J 526.**

(1250) *S. 82— Conditional discharge.*

When it is said that a payment by negotiable instrument is a conditional payment

Non-Ferrous Metals Control Order (1942)

what is meant is that such payment is subject to a condition subsequent that if the negotiable instrument is dishonoured on presentation the creditor may consider it as waste paper and resort to his original demand. *I. T. Commr.* v. *M/S Ogale Glass Works Limited,* **A I R 1954 S C 429 =1954 S C J 577.**

NON-FERROUS METALS CONTROL ORDER (1942)

(1251) *S. 2 — Proceedings for offence taken after expiry of Defence of India Act —Legality — (Constitution of India, Art. 372) —(General Clauses Act (1897), S. 6) — (Government of India Act (1935), S. 102) —(Defence of India Rules (1939), Rr. 81B and 121).*

When a Statute is repealed or comes to an automatic end by efflux of time, no prosecution for acts done during the continuance of the repealed or expired Act can be commenced after the date of its repeal or expiry because that would amount to the enforcement of a repealed or a dead Act. In cases of repeal of statutes this rule stands modified by S. 6 of the General Clauses Act. An expiring Act however is not governed by the rule enunciated in that section.

The Defence of India Act was enacted in exercise of the powers granted under S. 102 of the Government of India Act, 1935. The Non-Ferrous Metals Control Order related to a subject contained in the Provincial List (List II of the Seventh Schedule of the Government of India Act, 1935) and but for the proclamation of emergency the Central Government would not have been competent to make it. The emergency which existed in 1939 when the Defence of India Act was passed was continuing when the Control Order was passed in 1942. Section 1 (4) of the Defence of India Act provided that the Act shall remain in force during the continuance of the war and for a period of six months thereafter. The war came to an end on 1st April 1946 and the Act expired on the 30th of September 1946 together with all rules and orders made thereunder. The life of the Defence of India Act having expired on the 30th of September 1946, in the absence of a saving clause no prosecution for infringement of its provisions could be commenced after the expiry of the life of the Act, S. 6 of the General Clauses Act not being applicable to such a case.

Oaths Act (1873)

Such a saving clause was, however, provided by the Ordinance 12 of 1946. That Ordinance itself was repealed by Act 2 of 1948 which came into force on 5-1-1948. Where nothing was done before that date to commence a prosecution under the Defence of India Act and the Defence of India Rules for violation of the provisions of S. 2 of the Order no fresh proceedings could be commenced after that date for that violation under the Defence of India Act.

Section 102 (4) of the Government of India Act, under the provisions of which possibly the prosecution so commenced could have been justified and continued, was also the Constitution on the 26th of January 1950. Section 6, General Clauses Act has no application to the repeal of a statute made by Parliament in England and the repeal of which has been brought about by the Constitution of India and it was for this reason that Art. 372 of the Constitution provided for the continuance in force in the territory of India, notwithstanding the repeal of the enactments referred to in Art. 395 of the law in force immediately before the commencement of the Constitution until altered, amended or repealed by competent Legislature or authority. But that Article has no operation to the laws that had previously been repealed or which had died a natural death. Therefore, the Defence of India Act or any provisions for extending its life cannot be called in aid for continuing the prosecution after the commencement of the Constitution. *State of U. P.* v. *Seth Jagamandirdas,* **A I R 1954 S C 683.**

OATHS ACT (1873)

(1252) *Ss. 5, 13—Evidence Act (1872), S. 118 — Evidence of child —Omission to certify understanding duty to speak truth —Effect on admissibility of evidence.*

A Judge who recorded the statement of a girl of seven or eight years certified that she did not understand the sanctity of an oath and accordingly he did not administer one to her. He, however, did not certify that the child understood the duty of speaking the truth. The question was whether this omission rendered her evidence inadmissible.

Held, (1) an omission to administer an oath, even to an adult, goes only to the credibility of the witness and not his competency. The question of competency is

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dealt with in S. 118, Evidence Act. The Oaths Act does not deal with competency and under S. 13 of that Act omission to take oath does not affect the admissibility of the evidence. It therefore follows that the irregularity in question cannot affect the admissibility of the evidence of the girl: A. I. R. 1946 P. C. 3, *Rel. on.*

(2) It is, however, desirable that Judges and Magistrates should always record their opinion that the child understands the duty of speaking the truth and state why they think that, otherwise the credibility of the witness may be seriously affected, so much so, that in some cases it may be necessary to reject the evidence altogether.

(3) Whether the Magistrate or judge really was of that opinion can, however, be gathered from the circumstances when there is no formal certificate. One can presume that the Judge had that in mind from the fact that he examined the child after referring to a fact which arises out of the proviso : A. I. R. 1946 P. C. 3, *Rel. on. Rameshwar Kalyan Singh* v. *State of Rajasthan,* **A I R 1952 S C 54 =1952 S C J 46=1952 S C R 377.**

ORISSA AGRICULTURAL INCOME TAX (AMENDMENT) ACT 1949 (1 of 1950)

(1253) *Validity.*

The Orissa Agricultural Income-tax (Amendment) Act of 1950 could not be held to be a piece of colourable legislation, and as such invalid. *Case law discussed. K. C. G. Narayan Deo* v. *State of Orissa,* **A I R 1953 S C 375 =1954 S C R 1 =1953 S C J 592.**

(1253-A) **ORISSA ESTATES ABOLITION ACT (1 of 1952)**

See Tenancy Laws.

ORISSA HINDU RELIGIOUS ENDOWMENTS ACT (4 of 1939)

(1254) *S. 11—Validity.*

Section 11 of the Act cannot be objected to on the ground that it vests almost an uncontrolled and arbitrary power upon the Commissioner — The powers under S. 11 though seemingly wide can be exercised only to ensure that Maths and temples are properly maintained and the endowments are properly administered. As the object and purpose for which these powers could

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be exercised have been indicated precisely, it cannot be said that the authority vested in the Commissioner is in any way arbitrary or unrestricted. The explanation attached to the section only makes it clear that the general power conferred upon the Commissioner extends to passing of interim orders as the Commissioner might think fit. *Shree Jagan Nath* v. *State of Orissa,* **A I R 1954 S C 400.**

(1255) *Ss. 14 and 28—Validity.*

Section 14 lays down the duties of the trustee and the care which he should exercise in the management of the affairs of the religious institutions. The care, which he has to exercise, is what is demanded normally of every trustee in charge of trust estate and the standard is that of man of ordinary prudence dealing with his own funds or properties. This is a matter relating to the administration of the estate and does not interfere with any fundamental rights of the trustee. For the same reason no objection could be taken to the provision of S. 28 which lays down that the trustee of a temple shall be bound to obey orders issued under the provisions of the Act by the Commissioner. If the orders are lawful and made in pursuance of authority properly vested in the officer, no ligitimate ground could be urged for not complying with the orders. *Shree Jagan Nath* v. *State of Orissa,* **A I R 1954 S C 400.**

(1256) *Ss. 38, 39, 46 and 47—Validity —(Constitution of India, Arts. 19 (1) (f), 25, 26, 27 and 32).*

Sections 38, 39 and the proviso to S. 46 of the Orissa Hindu Religious Endowments Act, are invalid. The rest of the Act is not invalid or ultra vires the Orissa Legislature.

The settling of a scheme under Ss. 38 and 39 in regard to a religious institution by an executive officer without the intervention of any judicial tribunal amounts to an unreasonable restriction upon the right of property of the superior of the religious institution which is blended with his office. Sections 38 and 39 of the Act must, therefore, be held to be invalid.

There is nothing wrong in the provision of S. 46 itself but legitimate exception, can be taken to the proviso appended to the section. Under the law, as it stands, the Mahant or the superior of a Math has very wide powers of disposal over the surplus

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income and the only restriction that is recognised is that he cannot spend the income for his own personal use unconnected with the dignity of his office. The purposes specified in S. 46 are all conducive to the benefit of the institution and there is no reason why the discretion of the trustee in regard to the spending of surplus for such purposes also should be still further restricted by directions which the Commissioner may choose to issue. S. 47 (1) lays down how the rule of 'cy pres' is to be applied not merely when the original purpose of the trust fails or becomes incapable of being carried out either in whole or in part by reason of subsequent events, but also where there is a surplus left after meeting the legitimate expenses of the institution. Objection apparently be raised against the last provision of the sub-section, but as sub-s. (4) of S. 47 gives the party aggrieved by any order of the Commissioner in this respect to file a suit in a civil Court and the Court is empowered to modify or set aside such order of the Commissioner, there is no reasonable ground for complaint. AIR 1954 S C 282 *Ref. to. Shree Jagan Nath* v. *State of Orissa*,

A I R 1954 S C 400.

(1257) *S. 49—Validity — (Constitution of India, Art. 27).*

Section 49 of the Act was within competence of the Orissa Legislature as the contribution that is levied by S. 49 will have to be regarded as a fee and not a tax. The payment is demanded only for the purpose of meeting the expenses of the Commissioner and his office which is the machinery set up for due administration of the affairs of the religious institution. The collections made are not merged in the general public revenue and are not appropriated in the manner laid down for appropriation of expenses for other public purposes. They go to constitute the fund which is contemplated by S. 50 of the Act and this fund, to which also the Provincial Government contributes both by way of loan and grant, is specifically set apart for the rendering of services involved in carrying out the provisions of the Act. The fact that the amount of levy is graded according to the capacity of the payers though it gives it the appearance of an income-tax, is not by any means a decisive test.

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Further, an imposition like this cannot be said to be hit by Art. 27 of the Constitution. What is forbidden by Art. 27 is the specific appropriation of the proceeds of any tax in payment of expenses for the promotion or maintenance of any particular religion or religious denomination. The object of the contribution under S. 49 is not the fostering or preservation of the Hindu religion or of any denomination within it ; the purpose is to see that religious trusts and institutions wherever they exist are properly administered. It is the secular administration of the religious institutions that the Legislature seeks to control and the object, as enunciated in the Act, is to ensure that the endowments attached to the religious institutions are properly administered and their income is duly appropriated for purposes for which they were founded or exist. As there is no question of favouring any particular religion or religious denomination, Art. 27 could not possibly apply. A I R 1954 S C 282 *Ref. to. Shree Jagan Nath* v. *State of Orissa*,

A I R 1954 S C 400.

OUDH ESTATES ACT (1 of 1869)

(1258) *Ss. 11 and 12* — Talukdar — *Transfer* inter vivos *or by will — Right to convey limited or future interest.*

It cannot be contended that a *taluqdar* governed by the Oudh Estates Act cannot convey anything less than his absolute proprietary right in a property by transfer *inter vivos* or by will, or that it is not competent for him to create any limited interest or future estate. Apart from the plenary provision contained in S. 11, S. 12 of the Act which makes the rule against perpetuity applicable to transfers made by a *taluqdar*, furnishes a clear indication that the Act does not interdict the creation of future estates and limitations provided they do not transgress the perpetuity rule.

(On construction of the will in question held that the legatee, a younger son of a *taluqdar*, had only a life interest in the properties bequeathed under the terms of his father's will). *Raj Bajrang Bahadur Singh* v. *Thakurain Bakhtraj Kuer*,

A I R 1953 S C 7 =1953 S C R 232=1952 S C J 655.

(1259) *Ss. 13A (1) and 14 — Younger son of* taluqdar — *Property bequeathed to*

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him under will of his father—Application of S. 14.

A younger son of a *taluqdar* comes within the purview of S. 13A (1), and if he becomes full owner of the properties under the will of his father, succession to such properties after his death would certainly be regulated by the special rules of succession laid down in the Oudh Estates Act, and not by the ordinary law of inheritance. But S. 14 would have no application if the disposition by the will does not make him an absolute owner of the properties and he is given only an interest for life which is followed by subsequent interests created in favour of other persons. *Raj Bajrang Bahadur Singh* v. *Thakurain Bakhtraj Kuer* **A I R 1953 S C 7 =1953 S C R 232=1952 S C J 655.**

PART C STATES (LAWS) ACT (1950)

(1260) *S. 4, Proviso 1 — Validity — (Constitution of India, Art. 14).*

The saving clause contained in S. 4, Part C States (Laws) Act, is not a discriminatory provision and hence not unconstitutional.

There is no reason, why pending proceedings cannot be treated by the legislature as a class by themselves having regard to the exigencies of the situation which such pendency itself calls for. There can arise no question as to such a saving provision infringing Art. 14 so long as no scope is left for any further discrimination *inter se* as between persons affected by such pending matters. *Shiv Bahadur Singh* v. *State of V. P.*, **A I R 1953 S C 394.**

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(1261) *S. 34 — Presence of accused on scene, if essential—(Criminal P. C. (1898), S. 297).*

It is the essence of S. 34 that the person must be physically present at the actual commission of the crime. He need not be present in the actual room; he can, for instance, stand guard by a gate outside ready to warn his companions about any approach of danger or wait in a car on a nearby road ready to facilitate their escape, but he must be physically present at the scene of the occurrence and must actually participate in the commission of the offence in some way or other at the time the crime is actually being committed. The

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antithesis is between the preliminary stages, the agreement, the preparation, the planning, which is covered by S. 109, and the stage of commission when the plans are put into effect and carried out; S. 34 is concerned with the latter. It is true there must be some sort of preliminary planning which may or may not be at the scene of the crime and which may have taken place long before hand, but there must be added to it the element of physical presence at the scene of occurrence coupled with actual participation, which of course, can be of a passive character such as standing by a door, provided that is done with the intention of assisting in furtherance of the common intention of them all and there is a readiness to play his part in the pre-arranged plan when the time comes for him to act. The emphasis in S. 34 is on the word "done". It is essential that the accused join in the actual doing of the act and not merely in planning its perpetration. If the accused was not present he cannot be convicted with the aid of S. 34 : A I R 1925 P C 1, *Rel. on.*

Where the Judge in his charge to the jury directed that even though a person "may not be present when the offence is actually committed" and even if he remains "behind the screen" he can be convicted under S. 34 provided it is proved that the offence was committed in the furtherance of the common intention, it amounted to misdirection, and if acted upon, there was miscarriage of justice. *Ramayya* v. *State of Bombay*, **A I R 1955 S C 287.**

(1262) *S. 34 — Applicability and scope —Nature of evidence of prior concert.*

In the case of S. 34 it is well established that a common intention presupposes prior concert. It requires a pre-arranged plan because before a man can be vicariously convicted for the criminal act of another, the act must have been done in furtherance of the common intention of them all. Accordingly there must have been a prior meeting of minds. Several persons can simultaneously attack a man and each can have the same intention, namely the intention to kill, and each can individually inflict a separate fatal blow and yet none would have the common intention required by the section because there was no prior meeting of minds to form a pre-arranged plan. In a case like that, each would be individually liable for what-

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ever injury he caused but none could be vicariously convicted for the act of any of the others ; and if the prosecution cannot prove that his separate blow was a fatal one he cannot be convicted of the murder however clearly an intention to kill could be proved in his case. The partition which divides their bounds is often very thin; nevertheless, the distinction is real and substantial, and if overlooked will result in miscarriage of justice.

The plan need not be elaborate, nor is a long interval of time required. It could arise and be formed suddenly, as for example when one man calls on bystanders to help him kill a given individual and they, either by their words or their acts, indicate their assent to him and join him in the assault. There is then the necessary meeting of the minds. There is a pre-arranged plan however hastily formed and rudely conceived. But pre-arrangement there must be and premeditated concert. It is not enough, to have the same intention independently of each other, e.g., the intention to rescue another, and, if necessary to kill those who oppose.

It is true, prior concert and arrangement can, and indeed often must, be determined from subsequent conduct as, for example, by a systematic plan of campaign unfolding itself during the course of the action which could only be referable to prior concert and pre-arrangement, or a running away together in a body or a meeting together subsequently. But the inference of common intention should never be reached unless it is a necessary inference deducible from the circumstances of the case.

But to say this is no more than to reproduce the ordinary rule about circumstantial evidence, for there is no special rule of evidence for this class of case. At bottom, it is a question of fact in every case and however similar the circumstances, facts in one case cannot be used as a precedent to determine the conclusion on the facts in another. All that is necessary is either to have direct proof of prior concert, or proof of circumstances which necessarily lead to that inference, or "the incriminating facts must be incompatible with the innocence of the accused and incapable of explanation on any other reasonable hypothesis." *Pandurang* v. *State of Hyderabad*,

AIR 1955 S C 216.

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(1263) *S. 34—Applicability and scope.*

For applicability of S. 34, Penal Code a preconcert in the sense of a distinct previous plan is not necessary to be proved. The common intention to bring about a particular result may well develop on the spot as between a number of persons, with reference to the facts of the case and circumstances of the situation. Whether in a proved situation all the individuals concerned therein have developed only simultaneous and independent intentions or whether a simultaneous consensus of their minds to bring about a particular result can be said to have been developed and thereby intended by all of them, is a question that has to be determined on the facts. *Kirpal* v. *State of U. P.*, **AIR 1954 S C 707.**

(1264) *Ss. 34 and 120B—Applicability and scope—Proof of conspiracy.*

Where there was no evidence whatsoever of any pre-meditation or of a pre-arranged plan by the assailants of murdering the deceased the mere fact that all the accused were seen at the spot at the time of firing, could not be held sufficient to prove or even to infer a common intention, because unless the possibility as to who amongst them fired the fatal shot has not been eliminated by any evidence on record none of them could be convicted of murder under S. 302. Section 34 does not apply in such a case. Further, the evidence as to conspiracy under S. 120B, I. P. C., having been rejected, the same evidence cannot be used for finding a common intention under S. 34, I. P. C. AIR 1945 P C 118, *Referred. Ram Nath* v. *State of Madhya Pardesh*,

AIR 1953 S C 420.

(1265) Ss. 34 and 149—Common intention required by S. 34 and common object required by S. 149 are not the same thing —Accused when not charged with S. 34 even in the alternative recourse cannot be had to that section. *Dalip Singh* v. *State of Punjab*, **AIR 1953 S C 364 =1954 S C R 145=1953 S C J 532.**

(1266) *Ss. 34, 149 and 302 — Scope of Ss. 34 and 149 — Charge under S. 302 read with S. 149—Conviction under S. 302 read with S. 34 — Validity — (Criminal P. C. (1898), S. 237).*

Though there is substantial difference between S. 34 and S. 149, the sections also to some extent overlap and it is a question to be determined on the facts of each case whether the charge under S. 149 overlaps

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the ground covered by S. 34. If the common object which is the subject matter of the charge under S. 149 does not necessarily involve a common intention, then the substitution of S. 34 for S. 149 might result in prejudice to the accused and ought not therefore to be permitted. But if the facts to be proved and the evidence to be adduced with reference to the charge under S. 149 would be the same if the charge were under S. 34 then the failure to charge the accused under S. 34 could not result in any prejudice and in such cases the substitution of S. 34 for S. 149 must be held to be a formal matter. A I R 1925 P C 1 and A I R 1952 S C 167, *Rel. on.* AIR 1953 S C 364, *Expl.*

Held on facts that there could be no difference between the object and the intention with which the offence in question was committed and hence the conviction of the accused under S. 302 read with S. 34, when they had been charged only under S 302 read with S. 149 was not illegal. *Karmail Singh* v. *State of Punjab,*

AIR 1954 S C 204=1954 SC R 904 =1954 S C J 269.

(1267) *Ss. 34, 149 and 302—Conviction under S. 302 read with S. 149—Alteration in appeal to one under S. 302 read with S. 34 — (Criminal P. C. (1898), S. 423 (1) (b).)*

Where the facts of a case are such that the accused could have been charged alternatively, either under S. 302 read with S. 149 or under S. 302 read with S. 34, the conviction of the accused under S. 302 read with S. 149 can be altered by the High Court in appeal to one under S. 302 read with S. 34, upon the acquittal of the other accused persons. *Lakshman Singh* v. *The State,*

AIR 1952 S C 167=1952 S C R 839 =1952 S C J 230

(1268) *Ss. 34, 302 and 326 — Applicability.*

The three accused A, B and K were working the well that morning. When they saw M and S going past the well they asked them where they were going. On being told that they were going to harvest J's sugarcane field they abused them and told them not to go there but to work for them. They did not listen to them and walked on. When they had gone 30-40 paces, the three accused rushed at them and began to beat them with the handles of spears which were in the hands of B and K, and with a lathi which was in A's hand.

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J arrived at the spot and asked the accused why they were beating his labourers and stopped them from beating them. A hit him on the legs with his lathi and he fell down. K stabbed him with his spear near the ear. B then stabbed him with his spear on left jaw, put his legs on his chest and extracted the spear blade from his jaw. Just as the blade came off J died :

Held that in the circumstances the common intention to kill the deceased could not be attributed to the three accused. The only common intention that could be attributed to all the three accused in so far as the assault on J was concerned was the common intention to beat J also with the weapons in their hands, which were likely to produce grievous injuries. In this view, therefore, all the three would be guilty in respect of their assault on J for an offence under S. 326, I. P. C., while B alone would be guilty in respect of the offence under S. 302, I. P. C. *Kirpal* v. *State of U. P.,*

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(1268-A) Sections 34 and 149, 34, 149, 302—*See* under S. 149, infra.

(1269) *Ss. 96, 141 — Free fight — Unlawful assembly.*

A free fight is "when both sides mean to fight from the start, go to fight and there is a piched battle. The question of who attacks and who defends in such a fight is wholly immaterial and depends on the tactics adopted by the rival commanders."

Held that there could be no question of a free fight when there was a clear finding of the High Court that Anjaninandan's party were the aggressors. Having regard to the finding reached by the High Court that the riot took place at the narrow path as a result of the dispute about the Nepali pilgrim and the further fact that Gajanand's party received more numerous injuries one of which was fatal, it was obvious that Gajanand's party could not be said to have constituted an unlawful assembly. Gajanand's party was engaged in the peaceful pursuit of worship at their own takhat and was busy attending to the Puja for the Nepali pilgrim. At that point of time they were not members of an unlawful assembly. There was no material to justify the conclusion that they became members of the unlawful assembly at any time thereafter.

It was the party of Anjaninandan who left their place and came to Gajanand's

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takhat, presumably raising a dispute over the offerings made by the Nepali pilgrim. They came armed with deadly weapons and one of them inflicted a severe blow on one Sukkhu on Gajanand's side which resulted in his death and others received as many as 27 serious injuries. In these circumstances, it was not possible to suggest that both parties were predetermined for a trial of strength and had a free fight. Gajanand's party were the worst sufferers and though they also inflicted injuries on the other side, they did so in the exercise of their right of self-defence. A I R 1931 Lah 513, *Approved. Gajanand* v. *State of Uttar Pradesh*,

A I R 1954 S C 696.

(1270) *Ss. 97, 99, 100 and 102—Right of private defence of body—Extent.*

A communal riot broke out between some Sindhi refugees resident in the town and the local Muslims. The shops of the accused and his brother ran into each other and formed two sides of a rectangle, the accused's house facing North and the brother's house facing East. Each shop opened out on to a road. The mob approached accused's locality and broke into the portion of the building facing East in which his brother's shop was situate and looted it. There was a hole in the wall between the two portions of the building in which these two shops were situate and his brother's family got into accused's portion of the building through this hole and took refuge there. The accused's mother then told the accused that the crowd had burst into his (appellant's) shop and was looting it. The crowd was beating the doors of the accused's shop with their lathis. A shot was then fired by the accused, as also a second shot, and that caused the death of one Sindhi and injured three others, also Sindhis :

Held that the accused had no time to have recourse to the authorities. The mob or crowd had already broken into one part of the building and was actually beating on the doors of the other part. It was also evident that the accused had reasonable grounds for apprehending that either death or grievous hurt would be caused either to himself or his family. The circumstances in which he was placed were amply sufficient to give him a right of private defence of the body even to the extent of causing death. These things cannot be weighed in too fine a set of scales or in golden scales.

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Actual looting of the accused's shop was not necessary before the right could arise. The accused did not use more force than was necessary. *Amjad Khan* v. *State*,

A I R 1952 S C 165
=1952 S C R 567
=1952 S C J 227.

(1271) *Ss. 114 and 201—Procedure and Practice.*

Section 201 is not restricted to the case of a person who screens the actual offender; it can be applied even to a person guilty of the main offence, though as a matter of practice a Court will not convict a person both of the main offence and under S. 201. Where the border line between abetment of the offence and giving false information to screen the offender is rather thin, it is prudent to err on the safe side, and hold the accused guilty only of an offence under S. 201, I. P. C. The acquittal of the main offence is no legal impediment to the accused's conviction under S. 201 : A I R 1925 P. C. 130, *Ref. Kalawati* v. *Himachal Pradesh*,

A I R 1953 S C 131
=1953 S C R 546
=1953 S C J 144.

(1272) S. 120B—Proof — Offence under S. 120B *held not proved. Shiv Bahadur Singh* v. *State of Vindhya Pradesh*,

A I R 1954 C S 322.

(1273) *Ss. 141 and 34 — Assembly lawful at inception — Common object.*

An assembly which was lawful when it assembled can become unlawful subsequently. That is the Explanation to S. 141. Previous concert is not necessary. The common object required by S. 141 differs from the common intention required by S. 34 in this respect.

An assembly which was lawful at its inception held became unlawful the moment one of them called on others to assault a member of the other party and they in response to his invitation, started to chase the member of the other party who was running away. *Moti Das* v. *State of Bihar*,

A I R 1954 S C 657.

(1274) *Ss. 147 and 148—Sentence.*

The assemblage of 30 or 40 lathials at a place where the peaceable reaping of paddy is supposed to be in progress indicates an intention to use force; and where the complainant, who felt himself aggrieved did not take the law into his own hands but had recourse to the authorities and sought and obtained the assistance of those in local

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charge of the forces of law and order, to attack such an unarmed man peaceably registering a protest in the very manner contemplated by law, does not call for an exercise of leniency. *Moti Das* v. *State of Bihar*, **A I R 1954 S C 657.**

(1275) *S. 149—Finding that more than five persons were involved—Identification of only two — Effect.*

High Court giving clear finding that there were more than five persons in the band of attackers and believing eye witnesses who identified two of them—The mere fact that only two of them were satisfactorily identified does not weaken the force of the finding that more than five were involved — Use of S. 149 was, therefore, justified. *Nar Singh* v. *State of Uttar Pradesh*, **A I R 1954 S C 457.**

(1276) *S. 149 — Applicability.*

Before S. 149 can be called in aid, the Court must find with certainty that there were at least five persons sharing the common object. A finding that out of seven men in question three "may or may not have been" at the site of offence betrays uncertainty on this vital point and consequently a conviction resting on that uncertain foundation cannot be sustained. Especially in a murder case where the sentence of transportation in no less than four cases has been enhanced to death, it is essential that the Judge should give a finding on the point with unerring certainty. *Dalip Singh* v. *State of Punjab*, **A I R 1953 S C 364 1954 S C R 145=1953 S C J 532.**

(1277) *S. 149 — In prosecution of the common object.*

Under S. 149 the liability of the other members for the offence committed during the continuance of the occurrence rests upon the fact whether the other members knew before hand that the offence actually committed was likely to be committed in prosecution of the common object. Such knowledge may reasonably be collected from the nature of the assembly, arms or behaviour, at or before the scene of action. If such knowledge may not reasonably be attributed to the other members of the assembly then their liability for the offence committed during the occurrence does not arise:

Held that the accused appellants had only lathis which might possibly account for injuries on the deceased's left arm and left hand but they could not be held liable

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for murder by invoking the aid of S. 149. According to the evidence only two persons were armed with deadly weapons. Both of them were acquitted and a third, who was alleged to have had a spear, was absconding. No knowledge of the existence of deadly weapons could therefore be ascribed to the appellants, much less they would be used in order to cause death. Accordingly the appellants were not guilty of the offence under S. 302/149, I. P. C. A I R 1946 Pat 242, *Approved*. *Gajanand* v. *State of Uttar Pradesh*, **A I R 1954 S C 696.**

(1278) *S. 149—Conviction of less than five.*

It is not essential that five persons must always be convicted before S. 149 can be applied. Where it is possible to conclude that though five persons were unquestionably at the place of offence the identity of one or more is in doubt a conviction of the rest with the aid of the section would be good. *Dalip Singh* v. *State of Punjab*, **A I R 1953 S C 364 =1954 S C R 145=1953 S C J 532.**

(1279) Ss. 149 and 34 — S. 149 creates specific offence but S. 34 does not—Distinction between S. 149 and S. 34, pointed out. *Nanak Chand* v. *State of Punjab*, **A I R 1955 S C 274.**

(1280) *Ss. 149, 34 and 233.*

Under S. 149, a specific offence is created. Section 149 postulates that an offence is committed by a member of an unlawful assembly in prosecution of the common object of that assembly or such as a member of the assembly knew to be likely to be committed in prosecution of that object and declares that in such circumstances every person, who was a member of the same assembly at the time of the commission of the offence, was guilty of that offence. Under this section a person, who is a member of an unlawful assembly is made guilty of the offence committed by another member of the same assembly in the circumstances mentioned in the section, although he had no intention to commit that offence and had done no overt act except his presence in the assembly and sharing the common object of that assembly. Without the provisions of this section a member of an unlawful assembly could not have been made liable for the offence committed not by him but by another member of that assembly. Therefore when the accused are

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acquitted of riot and the charge for being members of an unlawful assembly fails, there can be no conviction of any one of them for an offence which he had not himself committed.

Section 149 creates an offence but the punishment must depend on the offence of which the offender is by that section made guilty. Therefore the appropriate punishment section must be read with it. It was neither desirable nor possible to prescribe one uniform punishment for all cases which may fall within it. The finding that all the members of an unlawful assembly are guilty of the offence committed by one of them in the prosecution of the common object at once subjects all the members to the punishment prescribed for that offence and the relative sentence.

Section 34 does not, however, create any specific offence. There is a clear distinction between the provisions of Ss. 34 and 149 and the two sections are not to be confused. The principal element in S. 34 is the common intention to commit a crime. In furtherance of the common intention, several acts may be done by several persons resulting in the commission of that crime. In such a situation S. 34 provides that each one of them would be liable for that crime in the same manner as if all the acts resulting in that crime had been done by him alone.

There is no question of common intention in S. 149. An offence may be committed by a member of an unlawful assembly and the other members will be liable for that offence although there was no common intention between that person and other members of the unlawful assembly to commit that offence provided the conditions laid down in the section are fulfilled. Thus if the offence committed by that person is in prosecution of the common object of the unlawful assembly or such as the members of that assembly knew to be likely to be committed in prosecution of the common object, every member of the unlawful assembly would be guilty of that offence, although there may have been no common intention and no participation by the other members in the actual commission of that offence: 34 Cal 698; A I R 1915 Cal 292, *Approved*. Observations of Lord Sumner in A I R 1925 P C 1, *Rel. on*; 47 Mad 746 : A I R 1925 Mad 1 : 25 Cri L J 1297 (FB); 9 All 645 : 1887 All W N 149 and 7 Pat 484 : A I R 1928 Pat 454 : 29 Cri L J 648, OVERRULED. *Nanak Chand* v. *State of Punjab*, **A I R 1955 S C 274.**

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(1281) *S. 161, Explanation 4—Motive or reward for doing.*

To constitute an offence under S. 161 it is enough if the public servant who receives the money takes it by holding out that he will render assistance to the giver "with any other public servant" and the giver gives the money under that belief. It may be that the receiver of the money is in fact not in a position to render such assistance and is even aware of it. He may not even have intended to do what he holds himself out as capable of doing. He may accordingly be guilty of cheating. Nonetheless he is guilty of the offence under S. 161. *Mahesh Prasad* v. *State of Uttar Pradesh*, **AIR 1955 SC 70.**

(1282) *S. 161 — "Any public servant."*

There is nothing in the terms of S. 161, requiring that the public servant contemplated therein must be a specified public servant. *Mahesh Prasad* v. *State of Uttar Pradesh*, **A I R 1955 S C 70.**

(1283) *S. 161 — Delay in trapping accused.*

The fact that nothing is done for a long time (here, two months) between the alleged offer to bribe and the actual trapping of the accused does not suggest that the story is false. The police authorities have per force to wait until the accused make a further move in the matter. It is not reasonable to suggest that the police authorities should go out of their way and actively invite bribes in order to trap the accused. *Mahadev* v. *State of Bombay*, **A I R 1953 S C 179 =1953 S C J 229.**

(1284) S. 161 — Offer of bribe to public servant — Public servant fully performing his duty regarding the case before offer — Showing any favour or rendering any service to accused not possible — Whether offence is committed by offer of bribe *(Quære) — Case law referred. Mahadev* v. *State of Bombay*, **A I R 1953 S C 179 =1953 S C J 229.**

(1285) *S. 161 — Evidence.*

It may be that the detection of corruption may some times call for the laying of traps, but there is no justification for the police

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authorities to bring about the taking of a bribe by supplying the bribe money to the bribe-giver where he has neither got it nor has the capacity to find it for himself. It is the duty of the police authorities to prevent crimes being committed. It is no part of their business to provide the instruments of the offence. *Shiv Bahadur Singh* v. *State of Vindhya Pradesh*,

A I R 1954 S C 322.

(1286) *S. 161—Evidence.*

The Magistrates should not be employed by the police as witnesses of police traps. The independence of the judiciary is a priceless treasure to be cherished and safeguarded at all costs against predatory activities of this character and it is of the essence that public confidence in the independence of the judiciary should not be undermined by any such tactics adopted by the executive authorities : A I R 1936 P C 253 (2), *Rel. on;* A I R 1951 Cal 524, *Approved. Shiv Bahadur Singh* v. *State of Vindhya Pradesh*, **A I R 1954 S C 322.**

(1287) *S. 161 — Evidence — (Evidence Act (1872), S. 133).*

Witnesses not willing party to giving of bribe to accused but only actuated with the motive of trapping the accused—Their evidence cannot be treated as the evidence of accomplices—Their evidence is nevertheless the evidence of partisan witnesses who were out to entrap the accused — The evidence cannot be relied upon without independent corroboration. *Shiv Bahadur Singh* v. *State of Vindhya Pradesh*, **AIR 1954 SC 322.**

(1288) *S. 161 — Evidence — (Evidence Act (1872), S. 133).*

Where the witnesses came on the scene after the whole affair was practically over and the stage had been reached when it was necessary to compare the numbers of the notes which had been recovered from the bedroom of the accused with the numbers of the notes which had been handed over to the person who gave the bribe when the raid was being organised and it was at that stage that they figured in the transaction their evidence could certainly not be impeached as that of partisan witnesses. *Shiv Bahadur Singh* v. *State of Vindhya Pradesh* **A I R 1954 S C 322.**

(1289) *S. 161 — Evidence.*

Held that the circumstance that on the numbers of the notes being tallied and his explanation in that behalf being asked for by the police authorities the accused was confused and could furnish no explanation in regard thereto supported the conclusion that the accused was guilty of the offence under S. 161. *Shiv Bahadur Singh* v. *State of Vindhya Pradesh*,

A I R 1954 S C 322.

(1290) *S. 161—With what motive or as reward for what act, bribe was paid, should be considered.*

The essence of an offence under S. 161 of the Penal Code is the obtaining or acceptance, by a public servant, of a gratification other than legal remuneration as a motive or reward for doing or forbearing to do an official act or for showing or forbearing to show any favour or disfavour to any person or for rendering any service or disservice to him. The first question that requires consideration, is with what motive or as reward for what act, was the sum paid as illegal gratification by the complainant and accepted by the accused.

No doubt a public officer has no right to demand any bribe; but when he is hauled up before a criminal Court to answer a charge of having taken illegal gratification, the question whether any motive for payment or acceptance of bribe at all existed is certainly a relevant and a material fact for consideration. *Madan Mohan* v. *State of Uttar Pradesh*, **A I R 1954 S C 638.**

(1291) *S. 201 — Evidence of offence — Circustantial evidence — (Evidence Act (1872), S. 3).*

In order to establish the charge under S. 201, Penal Code, it is essential to prove that an offence has been committed, that the accused knew or had reason to believe that such offence had been committed and with the requisite knowledge and with the intent to screen the offender from legal punishment causes the evidence thereof to disappear or gives false information respecting such offence knowing or having reason to believe the same to be false.

The Court should safeguard itself against the danger of basing its conclusion on suspicions however strong they may be and the necessity for adopting that caution becomes absolute in a case in which the situation of the parties, the belated investigation of the case and the sensation it had created demands the same : (1838) 2 Lewin 227 and A I R 1952 S C 343, *Rel. on.*

Where there is no direct evidence and the circumstantial evidence answers the ques

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tions, essential to the proof of the offence only vaguely and indefinitely and is not incompatible with the theory of the innocence of the accused there is no evidence on which the accused can be found guilty. *Palvinder Kaur* v. *State of Punjab*,

A I R 1952 S C 354
=1953 S C R 94=1952 S C J 545.

(1292) *S. 300—Circumstantial evidence.*

Both the accused and the deceased were seen together at about 2 P. M. on 25.7.1951 by the prosecution witnesses. Immediately after the alleged murder, the accused went to one Bishandas Tularam with the gold half mohur and the silver churas and offered to sell them to Bishandas Tularam, who did not purchase the half gold mohur but accepted the pledge of the silver churas. The accused went the next morning to Bhagwandas the goldsmith and sold to him the half gold mohur which was melted by Bhagwandas into a gold bar. The accused himself took the police to Bishandas Tularam and to Bhagwandas the goldsmith from whom the silver churas and the gold bar were recovered along with the relative documents showing the pledge and the sale by the accused to these respective parties. These silver churas were identified by the prosecution witnesses as those which were habitually worn by the deceased :

Held that as the ornaments were established to be the ornaments worn by the deceased and the accused was not in a position to give any satisfactory explanation as to how he came to be in possession of the same on the very same day on which the alleged murder was committed the circumstantial evidence was sufficient to hold the accused responsible for the murder of the deceased. *Sunder Lal* v. *State of M. P.*,

A I R 1954 S C 28.

(1293) *S. 300, Excep. 4, 302 and 304, Part 2 — Applicability.*

Sudden altercation between accused and deceased ensuing in free fight between two parties in which each party assaulted the other with sticks in their hand — Accused dealing only one blow on deceased resulting in his death — Injuries suffered by both sides evenly distributed — Accused receiving several injuries including injury on head and fracture of bone—Accused held entitled to benefit of exception to S. 300 and was guilty under S. 304, Part 2 and not under S. 302. *Prandas* v. *State*,

A I R 1954 S C 36.

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(1294) *Ss. 300 and 302—Murder charge —Cruel and revolting murder — Evidence —Necessity to examine evidence with more than ordinary care.*

Where the murder committed is a particularly cruel and revolting one, it is necessary to examine the evidence with more than ordinary care lest the shocking nature of the crime might induce an instinctive reaction against a dispassionate judicial scrutiny of the facts and law. *Kashmira Singh* v. *State of Madhya Pradesh*,

A I R 1952 S C 159
=1952 S C R 526
=1952 S C J 201.

(1295) *Ss. 300, 302, 378, 379—Circumstantial evidence—(Criminal P. C. (1898), S. 367) — (Evidence Act (1872), S. 3).*

The circumstances fully established against the accused were that on the date of the occurrence about an hour before sunset she was seen by two ladies proceeding with the deceased in the direction of the scene of the occurrence; that the accused came home without the deceased in her company in the evening of the same day in hurried steps and with her cloth lifted up; the cloth was, on examination, found to be stained with human blood and that the two Naulis of the deceased which were seen on her person up to her going towards the scene of the murder had been discovered at her instance from the thatch of her hut :

Held that the circumstantial evidence in the case was only consistent with the guilt of the accused. The murder undoubtedly was cold blooded and committed out of pure greed, and the accused was properly convicted under Ss. 302 and 379 of the Penal Code. *Nisa Stree* v. *State of Orissa*,

A I R 1954 S C 279.

(1296) *Ss. 300, 302 and 304, Part 2 — Offence held fell under S. 304, Part 2.*

The circumstances as found by the Court were that there was a severe exchange of abuses between the parties preceding the incident, that during the abuse the temper rose and both the parties came out of their respective houses in anger and that in the course of quarrel the accused dealt the fatal blow on the head of the deceased with his lathi :

Held that even though the circumstances were such as not to bring the case within Exception 1 to S. 300 the crime was committed without premeditation in a sudden fight in the heat of passion upon a sudden

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quarrel and without the accused having taken undue advantage or acted in a cruel or unusual manner thus bringing the case within Exception 4 thereto with the result that the offence committed was culpable homicide not amounting to murder. The accused, therefore, could not be convicted of having committed an offence under S. 302 of the Indian Penal Code;

Held further that when the fatal injury was inflicted by the accused on the head of the deceased by only one blow it could as well be that the act by which death was caused was not done with the intention of causing death or of causing such bodily injury as was likely to cause death. The act appeared to have been done with the knowledge that it was likely to cause death, but without any intention to cause death or to cause such bodily injury as was likely to cause death within the meaning of Part II of S. 304 of the Penal Code. *Chamsu Budhwa* v. *State of M. P.*,

A I R 1954 S C 652.

(1297) Ss. 300 and 411—Murder taking place at night—Early next morning accused disappearing from his house — After his arrest accused producing articles which were removed from body of deceased from his house — Inquests made shortly after dawn and not late in day — Accused held was not merely receiver of stolen property but murderer. *Ram Bharosey* v. *State of U. P.*, **A I R 1954 S C 704.**

(1298) *S. 302—Sentence.*

The sentence of death substituted by the sentence of transportation for life, having regard to the time that has elapsed since the occurrence and the probable motive of prevention of cruelty to a helpless woman. *Kalawati* v. *State of H. P.*,

A I R 1953 S C 131
=1953 S C R 546
=1953 S C J 144.

(1299) *Ss. 302 and 149—Seven accused charged under S. 302 read with S. 149 — Five acquitted in appeal — Conviction of two under Ss. 302 and 149 — (Criminal P. C. (1898), S. 367).*

The two appellants were charged and convicted along with five others of having constituted an unlawful assembly and committed murder (S. 302 read with S. 149). But in the appeal before the High Court the five accused were given benefit of doubt and acquitted. In an appeal before the Supreme Court it was contended that the said five

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accused having been acquitted, and in the absence of a charge that five other unknown persons constituted an unlawful assembly, the two appellants could not be held members of the unlawful assembly which had the common object :

Held after reviewing the evidence and weighing the opinion embodied in the judgment of the High Court that there was no scope left for introducing into the case the theory of the benefit of doubt, that the five accused were wrongfully acquitted and that though their acquittal stood that circumstance could not affect the conviction of the appellants under S. 302 read with S. 149. *Marachalil Pakku* v. *State of Madras*, **A I R 1954 S C 648.**

(1300) *S. 302 — Sentence.*

In a murder case death sentence should ordinarily be imposed. But the trial Judge has the discretion to impose the lesser punishment of transportation for reasons recorded by him and when those reasons are such that a judicial mind could properly find on them, the appellate Court could not interfere with that discretion. There must be strong reasons to entitle the appellate Court to enhance the sentence to death and it is not enough if the appellate Court feels that left to itself it would have awarded the greater penalty of death.

Conviction for murder in which no one of the accused is convicted for his own but is being held vicariously liable for the act of another or others — When facts are fully known as to amongst the accused who inflicted the fatal blows it is a sound exercise of judicial discretion to discriminate in punishment — When otherwise and the Judge decides to award the lesser punishment to all the accused that is also the exercise of sound judicial discretion. *Dalip Singh* v. *State of Punjab*,

A I R 1953 S C 364
=1954 S C R 145
=1953 S C J 532.

(1301) *S. 302—Sentence—Judges agreeing as to guilt but differing on question of sentence — Sentence should be that of transportation — (Criminal P. C. (1898), Ss. 378, 376 and 367 (5)).*

The sentence should be reduced to transportation where there is difference of opinion in the High Court not only on the question of guilt, but also on that of sentence. But the discretion of judges in this

matter should not be fettered for a question of sentence is, and must always remain, a matter of discretion, unless the law directs otherwise. But when appellate Judges, who agree on the question of guilt, differ on that of sentence, it is usual not to impose the death penalty unless there are compelling reasons. *Pandurang* v. *State of Hyderabad*,

A I R 1955 S C 216.

(1302) *Ss. 304A, 304 and 302 — Rash and negligent act resulting in death of a person.*

A, a mahant, went to the house of B who was having a drink party. B was respectful to A and was over-anxious to show all hospitality to him. B was anxious that the Mahant should not go away from his house without taking meals and spending the night with him, and seeing that he was going away, in all probability, B let go his gun without aiming it at the Mahant in order to prevent him from leaving his place by terrifying him to some extent. The shot hit A in chest and he died of the wound later on. The evidence of the eye witnesses and the first information report showed that the incident happened in a very short time and suddenly but the story that B took aim before firing at the Mahant or that he said that he had never allowed in the past anybody to go like that from his house was subsequently introduced in the case to add gravity to the offence committed by the accused: *Held*, that on the materials placed on the record it could not be held proved that B had any intention of firing at the Mahant. He seems to have pulled the trigger without aiming at the Mahant in a state of intoxication in order to see that by the gun fire the Mahant was prevented from leaving his place. It was a wholly rash and negligent act on *B's* part or at the worst was an act which would amount to manslaughter. It could not be held to constitute an offence of murder. B was, therefore, held guilty of an offence under S. 304A, I. P. C. and sentenced to imprisonment already undergone by him.

Held further, that even if the offence were to be regarded as falling under S. 304, I. P. C. a severer punishment than the imprisonment already undergone by him. was not necessary. *Sadhu Singh* v. *State of Pepsu*,

A I R 1954 S C 272.

(1303) *S. 326—Hurt by axe on head.*

A blow on the head with an axe which penetrates half an inch into the head is likely to endanger life. *Pandurang* v. *State of Hyderabad*,

A I R 1955 S C 216.

(1304) *S. 352—Sentences.*

Where the accused was a railway officer of some status, and as such it was his duty to behave fairly and courteously to passengers, his conduct in forcibly trying to occupy the seat occupied by a woman passenger and her babe and assaulting her when she resisted, calls for censure, and where he had added insult to injury in casting aspersions on the character of that passenger the Court must award the maximum sentence permissible under S. 352. *Ram Das* v. *State of W. B.*,

A I R 1954 S C 711.

(1305) *Ss. 354 and 352—Offence under S. 354—Essentials.*

Where an accused is tried for an offence under S. 354, and an assault is proved, the next question to be considered is whether he did so with intent to outrage the woman's modesty, or with the knowledge that it would be outraged.

The story of a person trying to outrage the modesty of two women in the presence of two gentlemen is so unnatural, that there must be clear and unimpeachable evidence before it can be accepted.

Held on evidence that the accused was not guilty under S. 354 but under S. 352. *Ram Das* v. *State of W. B.*,

A I R 1954 S C 711.

(1306) *S. 405 — Scope and applicability.*

To constitute an offence of criminal breach of trust, it is essential that the prosecution must prove first of all that the accused was entrusted with some property or with any dominion or power over it. It has to be established further that in respect of the property so entrusted, there was dishonest misappropriation or dishonest conversion or dishonest use or disposal in violation of a direction of law or legal contract, by the accused himself or by someone else which he willingly suffered to do. It follows almost axiomatically from this definition that the ownership or beneficial interest in the property in respect of which criminal breach of trust is alleged to have been committed, must be in some person other than the accused and the latter must hold it on account of some person or in some way for his benefit.

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The accused, a Receiver of a Cotton Mill appointed by the High Court, in the exercise of discretion conferred on him by the High Court, demanded and received payment over and above the market price in respect of bales allotted to a shopkeeper. The accused was charged for criminal breach of trust in misappropriating the extra money to himself without bringing it into the Mills accounts. The question was whether the extra money was given by the shopkeeper to the accused, for and on behalf of the Mill or was given to him personally as a motive or reward for showing some favour :

Held (i) (on appreciation of evidence) that the money was intended to be paid to the accused as his own personal profit and it was not an item of additional or extra price for the goods purchased which was demanded by or paid to the accused on behalf of the Mill : A I R 1952 T C 128, *Reversed.*

(ii) As the sum was paid by way of illegal gratification, there could be no question of entrustment in such payment. The criminality of the act consisted in illegal receipt of the money and the question of subsequent misappropriation or conversion of the same did not arise at all. *C. M. Narayan* v. *State of Travancore-Cochin*

A I R 1953 S C 478.

(1307) S. 409—Accused charged of criminal breach of trust — Charge not proved —Evidence indicating abetment of offence under S. 409 — But in view of fact that conviction for abetment would imply a definite finding that another (the officer of the accused) was guilty of offence under S. 409, conviction was not altered — (Criminal P. C. (1898), S. 439). *Bhagat Ram* v. *State of Punjab,*

A I R 1954 S C 621.

(1308) *Ss. 409 and 467—Embezzlement and forgery by public servant—Sentence—Prevention of Corruption Act (1947), S. 5.*

Where the accused a public servant was prosecuted and convicted for offences under Ss. 409 and 467 Penal Code and sentenced to 7 years' and 4 years' rigorous imprisonment for respective offences, taking into consideration the fact that if he had been prosecuted under the Prevention of Corruption Act, the maximum sentence which would have been awarded to him would have been seven years' rigorous imprisonment though the special Court trying him would have imposed upon him a substantial fine even to the extent of the amount embezzled by him, and having regard to the circumstances of the case, the sentences were reduced to three years' rigorous imprisonment in each case. *Mangleshwari* v. *State of Bihar,*

A I R 1954 S C 715.

(1309) S. 411—*Scope.*

It is the duty of the prosecution in order to bring home the guilt of a person under S. 411, I. P. C. to prove, (1) that the stolen property was in the possession of the accused, (2) that some person other than the accused had possession of the property before the accused got possession of it, and (3) that the accused had knowledge that the property was stolen property. *Trimbak* v. *State of M. P.*

A I R 1954 S C 39.

(1310) *Ss. 411, 410 — Knowing or having reason to believe — (Evidence Act (1872), S. 114).*

From the bare fact that the accused was residing in the complainant's village his knowledge that the ornaments were stolen property cannot legitimately be concluded. *Trimbak* v. *State of M. P.,*

A I R 1954 S C 39.

(1311) *S. 420—Sentence.*

Where there is strong indication, on the evidence on record, that there were other and perhaps bigger persons involved in the fraud for which the accused was tried and they are not brought to book, the circumstance, though it does not excuse or exonerate the accused from his guilt which has been established beyond reasonable doubt, has, nevertheless, a bearing on the question of sentence. *Damodram* v. *State of Travancore-Cochin.* **A I R 1953 S C 462.**

(1312) *S. 420— Sale of goods on condition of payment of price on delivery—Non-payment, when amounts to cheating.*

Where the charge against the accused is under S. 420 in that he induced the complainant to part with his goods, on the understanding that the accused would pay for the same on delivery but did not pay, if the accused had at the time he promised to pay cash against delivery an intention to do so, the fact that he did not pay would not convert the transaction into one of cheating. But if on the other hand he had no intention whatsoever to pay but merely said that he would do so in order to induce the com-

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plainant to part with the goods then a case of cheating would be established.

(*Held* on evidence, that the accused had no intention of paying). *Mahadeo Prasad* v. *State of West Bengal*,

A I R 1954 S C 724.

(1313) *Ss. 463, 465, 466 — Document ante-dated.*

Document bearing a certain date brought into existence on a later date—Accused held guilty of forgery. *Shiv Bahadur Singh* v. *State of Vindhya Pradesh*,

A I R 1954 S C 322.

(1314) *S. 497—Last sentence—Validity —(Constitution of India, Arts. 14, 15).*

Sex is a sound classification and although there can be no discrimination in general on that ground, the Constitution itself provides for special provisions in the case of women and children by clause (3) of Art. 15. Articles 14 and 15 thus read together validate the last sentence of S. 497, I. P. C. which prohibits the woman from being punished as an abettor of the offence of adultery. A I R 1951 Bom. 470, *Affirmed. Yusuf Abdul Aziz* v. *State of Bombay*,

A I R 1954 S C 321 =1954 S C R 930=1954 S C J 385.

(1315) *S. 499 — Libel of Court and Contempt of Court—Distinction — S. 499, Penal Code, does not exclude action under S. 2 of Act 12 of 1926 — (Contempt of Courts Act (1926), S. 2).*

A libellous reflection upon the conduct of a Judge in respect of his judicial duties may certainly come under S. 499, Penal Code, and it may be open to the Judge to take steps against the libeller in the ordinary way for vindication of his character and personal dignity as a Judge; but such libel may or may not amount to contempt of Court, which is something more than mere defamation and is of a different character. What is made punishable in the Indian Penal Code is the offence of defamation as defamation and not as contempt of Court. If the defamation of a subordinate Court amounts to contempt of Court, proceedings can certainly be taken under S. 2, Contempt of Courts Act, quite apart from the fact that other remedy may be open to the aggrieved officer under S. 499, Penal Code. 10 Cal. 109 (P. C.) and 1893 A. C. 138, *Rel. on. Ramkrishna Reddy* v. *State of Madras*,

A I R 1952 S C 149.

PEPSU JUDICATURE ORDINANCE 10 of 2005 Sm. (1948-49)

(1316) *Ss. 116, 52 — Right of appeal vested under Patiala States Judicature Farman 1999 (Sm.) — Not taken away by Pepsu Ordinance 10 of 2005 — (Interpretation of Statutes—Retrospective effect).*

The right of appeal from an order of a Single Judge to a Division Bench without a certificate, vested in a person under the Patiala States Judicature Farman, 1999 (Sm.) is not taken away by the passing of the Pepsu Ordinance 10 of 2005 (Sm).

A person cannot be deprived of a vested right of appeal by a subsequent change in the law, unless the later enactment provides expressly or by necessary implication for retrospective effect being given.

Section 116 of the Pepsu Ordinance 10 of of 2005 (Sm.) is a transitory regulation providing for a change over of proceedings from one set of Courts in the Covenanting State to others of like status in the Union and for their continuance etc., in the latter Courts. It does not say that the proceedings must be treated as having freshly commenced. What is contemplated in the latter part of the section is a notional commencement, if such a term could be used. The section obviously means that all rights which arose or are likely to arise in the future shall remain intact notwithstanding the new set-up, and that they would be dealt with by the Union Courts in place of the Courts of the Covenanting State. There is nothing in the section to justify the view that any taking away of a vested right of appeal retrospectively was intended. (1905) A C 369. *Rel. on.:* A I R 1951 Pepsu 39, *Reversed. Ganpat Rai* v. *Chamber of Commerce*,

AIR 1952 S C 409=1953 S C R 752 =1952 S C J 564.

PRECEDENTS

(1317) *Former Federal Court and Privy Council decisions — (Civil P. C. (1908), Preamble.)*

The Supreme Court of India is in no way bound by the decisions given by the former Federal Court of India or by the Privy Council. *State of Bihar* v. *Abdul Majid*,

AIR 1954 S C 245=1954 SC R 786 =1954 S C J 300.

(1318) Decision of Privy Council is not binding on Supreme Court—Supreme Court can declare Privy Council ruling as not-

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sound—(C. P. C. (1908), Preamble—Precedents). *Sirinivas* v. *Narain*,

AIR 1954 S C 380=1954 S C J 408.

(1319) Obiter—Observations by a Judge of eminence in Privy Council case — Observations in keeping with provisions of statute and directly arising on arguments made before Privy Council — Observations are entitled to great weight — (Civil P. C. (1908), Preamble — Precedents). *Nanak Chand* v. *State of Punjab*,

AIR 1955 S C 274.

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(1320) *Custom—Custom set up by non-Muslims—Proof — (Custom—Pre-emption —Non-Muslims.)*

If the right of pre-emption is set-up by non-Muslims on the basis of a custom, the existence of the custom is a matter to be established by proper evidence. But when the existence of a custom under which the Hindus claim to have the same rights of pre-emption as Muhammadans, in any district, is generally known and judicially recognised, it is not necessary to prove it by further evidence. A long course of decisions has established the existence of such custom in Bihar, Sylhet and certain parts of Gujerat. *Audh Bihari* v. *Gajadhar*,

AIR 1954 S C 417 =1954 S C J 590.

(1321) *Custom—Non-muslims — Observance of forms prescribed by Muhammadan law.*

When a custom of pre-emption is established by evidence to prevail amongst non-Muslims in a particular locality, it must be presumed to be founded on and co-extensive with the Muhammadan law on that subject unless the contrary is shown; the Court may as between Hindus administer a modification of the law as to the circumstances under which the right may be claimed when it is shown that the custom in that respect does not go to the whole length of the Muhammadan law of pre-emption, but the assertion of right by suit must always be preceded by an observance of the preliminary forms prescribed in the Muhammadan law which forms appear to have been invariably observed and insisted on through the whole of the cases from the earliest time of which we have record. 39 Cal 915 (P C), *Rel. on. Audh Bihari* v. *Gajadhar*,

AIR 1954 S C 417 =1954 S C J 590.

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(1322) *Custom—City of Benaras—Non-muslims — No proof that the custom is available only to the natives of city — (Custom—Pre-emption — Non-muslims — City of Benaras), 32 Cal 988; 24 W R 95, held not good law.*

There is a custom of pre-emption amongst the non-muslims in the city of Banaras. The ambit or extent of a custom is a matter of proof and the party is certainly competent to adduce evidence to show that the custom of pre-emption prevailing in the city of Banaras was available not against all persons who held lands within it but only against a particular class of persons.

But it was not proved that the custom of pre-emption was of a character different from that which is contemplated by Muhammadan law. It was not shown that the pre-emption could be claimed only against persons who are the inhabitants of the place or are domiciled therein and that it could not be enforced in respect of a property situated in the city, the owner of which is not a native of that place. 32 Cal 988 and 24 W R 95, commented upon and held not good law.

The correct legal position must be that when a right of pre-emption rests upon custom it becomes the lex loci or the law of the place and effects all lands situated in that place irrespective of the religion or nationality or domicile of the owners of the lands except where such incidents are proved to be a part of the custom itself. *Audh Bihari* v. *Gajadhar*, AIR 1954 S C 417 =1954 S C J 590.

(1323) *Law of pre-emption in India — Origin and development.*

The law of pre-emption was introduced in this country by the Muhammadans. There is no indication of any such conception in the Hindu Law and the subject has not been noticed or discussed either in the writings of the Smitri Writers or in those of later commentators.

During the period of the Mughal emperors the law of pre-emption was administered as a rule of common law of the land in those parts of the country which came under the domination of the Muhammadan rulers, and it was applied alike to Muhammadans and Zimmees (within which Christians and Hindus were included), no distinction being made in this respect between persons of different races and creeds. In course of time the Hindus came to adopt pre-emption

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as a custom for reasons of convenience and the custom is largely to be found in provinces like Bihar and Gujerat which had once been integral parts of the Muhammadan empire.

Opinions differ as to whether the custom of pre-emption amongst village communities in Punjab and other parts of India was borrowed from the Muhammadans or arose, independently of the Muhammadan Law, having its origin in the doctrine of "limited right" which has always been the characteristic feature of village communities,

Since the establishment of British rule in India, the Muhammadan law ceased to be the general law of the land and as pre-emption is not one of the matters respecting which Muhammadan law is expressly declared to be the rule of decision where the parties to a suit are Muhammadans, the courts in British India administered the Muhammadan law of pre-emption as between Muhammadans entirely on grounds of justice, equity and good conscience. Here again there was no uniformity of views expressed by the different High Courts in India and the High Court of Madras definitely held that the law of pre-emption by reason of its placing restrictions upon the liberty of transfer of property, could not be regarded to be in consonance with the principles of justice, equity and good conscience. Hence the right of pre-emption is not recognised in the Madras Presidency at all even amongst Muhammadans except on the footing of a custom.

Rights of pre-emption have in some provinces like Punjab, Agra and Oudh, been, embodied in statutes passed by the Indian Legislature and where the law has been thus codified it undoubtedly becomes the territorial law of the place and is applicable to persons other than Muhammadans by reason of their property being situated therein.

In other parts of India, its operation depends upon custom and when the law is customary the right is enforceable irrespective of the religious persuasion of the parties concerned. Where the law is neither territorial nor customary, it is applicable only between Muhammadans as part of their personal law provided the judiciary of the place where the property is situated does not consider such law to be opposed to the principles of justice, equity and good conscience.

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Apart from these a right of pre-emption can be created by contract and such contracts are usually found amongst sharers in a village. *Audh Bihari* v. *Gajadhar*,

A I R 1954 S C 417
=1954 S C J 590.

(1324) *Nature of right—Right attached to land.*

It would not be correct to say that the right of pre-emption under Muhammadan law is a personal right on the part of the pre-emptor to get a re-transfer of the property from the vendee who has already become owner of the same. It is true that the right becomes enforceable only when there is a sale but the right exists antecedently to the sale, the foundation of the right being the avoidance of the inconveniences and disturbances which would arise from the introduction of a stranger into the land. The sale is a condition precedent not to the existence of the right but to its enforcibility.

The correct legal position seems to be that the law of pre-emption imposes a limitation or disability upon the ownership of a property to the extent that it restricts the owner's unfettered right of sale and compels him to sell the property to his co-sharer or neighbour as the case may be. The person who is a co-sharer in the land or owns lands in the vicinity consequently gets an advantage or benefit corresponding to the burden with which the owner of the property is saddled, even though it does not amount to an actual interest in the property sold.

The crux of the whole thing is that the benefit as well as the burden of the right of pre-emption run with the land and can be enforced by or against the owner of the land for the time being although the right of the pre-emptor does not amount to an interest in the land itself. If the right of pre-emption had been only a personal right enforceable against the vendee and there was no infirmity in the title of the owner restricting his right of sale in a certain manner, a bona fide purchaser without notice would certainly obtain an absolute title to the property, unhampered by any right of the pre-emptor and in such circumstances there could be no justification for enforcing the right of pre-emption against the purchaser on grounds of justice, equity and good conscience on which grounds alone the right could be enforced at the present

Press (Emergency Powers) Act (1931)

day. The law of pre-emption creates a right which attaches to the property and of that footing only it can be enforced against the purchaser.

The burden and benefit of a right of pre-emption are incidents annexed to the lands belonging respectively to the vendor and the pre-emptor and is not the right merely one of re-purchase, which a neighbour or cosharer enjoys under Muhammadan law, and which he can enforce personally against the vendee in whom the title to the property has already vested by sale. 4 Beng L R 134; 13 WR 21 (FB). *Overruled*; AIR 1929 Bom 206, *Held Overruled* by A I R 1941 Bom 262 (FB); 7 All 775 (FB); A I R 1922 Pat 601; A I R 1941 Bom 262 (FB), *Approved*. *Audh Bihari* v *Gajadhar*,

A 1 R 1954 S C 417
=1954 S C J 590.

PRESS (EMERGENCY POWERS) ACT (1931)

(1325) *S. 4 (1) (a) — Restrictions imposed by S. 4 (1) (a) are within the ambit of Constitution of India, Art. 19 (2).*

Clause (a) of S. 4 (1), Press (Emergency Powers) Act, 1931, deals with words or signs or visible representations which incite to or encourage, or tend to incite to or encourage the commission of any offence of murder or any cognizable offence involving violence. Speeches or expressions on the part of an individual which incite to or encourage the commission of violent crimes, such as murder, cannot but be matters which would undermine the security of the State and come within the ambit of a law sanctioned by Art. 19 (2) of the Constitution. Hence, S. 4 (1) (a) is not repugnant to the Constitution. A I R 1950 S C 124, *Expl.*; A I R 1950 S C 129, *Ref.*; A I R 1951 Pat 12 (SB), REVERSED. *State of Bihar* v. *Shailabala Devi*,

A I R 1952 S C 329
=1952 S C R 654 = 1952 S C J 465.

(1326) *S. 4 (1)—Construction of document — Writing has to be considered as a whole — (Document—Construction of).*

In order to determine whether a particular document falls within the ambit of any of the clauses of S. 4 (1), the writing has to be considered as a whole and in a fair and free and liberal spirit, not dwelling too much upon isolated passages or upon a strong word here and there. and an endeavour should be made to gather the general effect which the whole composition would have on the mind of public. A I R 1941 Pat 132 (SB), *Distinguished*.

Per *Mukherjea J.* — Account should also be taken of the place, circumstances and occasion of the publication, as a clear appreciation of the background in which the words are used is of very great assistance in enabling the court to view them in their proper perspective. *State of Bihar* v. *Shailabala Devi*,

A I R 1952 S C 329
=1953 S C R 654=1952 S C J 465.

(1327) *S. 4 (1) (a) — "Sangram" — Applicability of S. 4 (1) (a) to printer of.*

A leaflet, entitled "Sangram" or struggle, was written in high-flown Bengali prose with a large mixture of poetic expressions borrowed at random from the writings of some well-known poets of Bengal. The object of the writing as far as could be gathered from the leaflet was to give a poetic or idealistic picture of what is meant and connotated by 'struggle' or revolution. The aim and end of 'struggle,' as stated in the leaflet, was to wipe out "oppression, injustice or wrong" which is "pervading all over the world from the past to the future," and it was only after all wrongs, injustice and oppression have perished that a new world would be built up :

Held that in the absence of any evidence whatsoever for connecting the leaflet with any agitation or movement at the time it was written in the locality and in the face of the failure of the State Government to prove the attendant circumstances and the actual background of the publication it could not be held that leaflet fell within the mischief of S. 4 (1) (a) and that no security order could be passed against the keeper of the press under that section: A I R 1947 Nag 1 (SB), *Ref. State of Bihar* v. *Shailabala Devi*, **A I R 1952 S C 329**
=1952 S C R 654=1952 S C J 465.

PRESIDENCY SMALL CAUSE COURTS ACT (1882)

(1328) *S. 43 — Order for delivery of possession.*

Although under the rules framed under the Act, application under S. 41 is initiated by a plaint, the proceeding is not a suit and the order for delivery of possession under S. 43 does not strictly speaking amount to a decree for recovery of possession: A I R

Prevention of Corruption Act (1947)

1927 Bom 556, *Ref. Nalinakhya* v. *Shyam Sunder*, **A I R 1953 S C 148 =1953 S C R 533=1953 S C J 201.**

PREVENTION OF CORRUPTION ACT (1947).

(1329) *S. 5 (3)—Applicability.*

Sub-s. (3) of S. 5 sets out a new rule of evidence. Therefore, all that the prosecution has to do is to show that the accused, or some person on his behalf, is in possession of pecuniary resources or property disproportionate to his known sources of income and for which the accused cannot satisfactorily account. Once that is established then the Court has to presume, unless the contrary is proved, that the accused is guilty of the new offence created by S. 5, namely criminal misconduct in the discharge of his official duty.

The accused who was on tour was found in possession of Rs. 3,148. He accounted for Rs. 450 of that sum by showing that it was paid to him at the time as a trap. He had been acquitted of that offence: so all he had to account for was the balance Rs. 2,698. This was a large sum for a touring officer to carry with him in cash while on tour. The accused was a Government Factory Inspector and his salary was only Rs. 450 a month. The total sums drawn by him during his entire period of service of thirteen months was Rs. 6,045 as salary and Rs. Rs. 2,155 as travelling allowance. He owned O.648 acres of land which brought in no income worth the name. On the expenditure side of the accused's account he had a substantial family establishment which would not leave him enough margin for saving such a large sum of money. No other source of income had been disclosed. It was evident that no touring officer of his status and in his position would require such a large sum of money for his touring purposes even if he was away from head-quarters for a month. His explanation was considered unsatisfactory by both Courts and was disbelieved. These were all questions of fact.

Held that once the facts set out above were found to exist and the explanation of the accused rejected as unsatisfactory, S. 5 (3) was at once attracted and the Court was bound to presume that the accused was guilty under S. 5 (2). *Biswabhushan* v. *State of Orissa*. **A I R 1954 S C 359 =1954 S C J 537.**

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(1330) *S. 5 (1) (a)—Charge under—Requirements—(Criminal P. C. (1898), S. 221).*

No particulars need be set out in the charge as the offence under S. 5 (1) (a) does not consist of individual acts of bribe taking as in S. 161 of the Penal Code but is of a general character. Individual instances may be useful to prove the general averment in particular cases but it is by no means necessary because of the presumption which S. 5 (3) requires the Court to draw.

Held further that the accused had not been prejudiced because he knew everything that was being urged against him and led evidence to refute the facts on which the prosecution relied. He was also questioned about the material facts set out above in his examination under S. 342 of the Criminal Procedure Code and was given a chance then as well to give such explanation as he wished. *Biswabhushan* v. *State of Orissa*, **A I R 1954 S C 359 =1954 S C J 537.**

(1331) *S. 5 (4)—Prior to its amendment by Act 59 of 1952—Violation of.*

During the course of an investigation started on 2-5-1949, by an inspector of Police in respect of offences punishable under S. 420, I. P. C. and S. 6, Essential Supplies (Temporary) Powers Act committed by a certain person who was not a public servant, it was found that some persons who were public servants were liable to be prosecuted under S. 5 (2), Prevention of Corruption Act. The Inspector then made an application to the Magistrate for sanction for investigation under S. 5 (4) of the Act against such public servants. The sanction was given on 20-3-1951 and a charge-sheet was filed on 15-11-1951.

Held that in the circumstances of the case, the continuance of such portion of the investigation as remained, as against the public servants concerned by the same officer after obtaining the permission of the Magistrate was reasonable and legitimate and therefore, there was no such defect in the investigation as to call for interference. *H. N. Rishbud* v. *State of Delhi*. **A I R 1955 S C 196.**

(1332) *S. 5-A— Discretion of Magistrate.*

When a Magistrate is approached for granting permission under S. 5-A, he is expected to satisfy himself that there are good and sufficient reasons for authorising

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an officer of a lower rank to conduct the investigation. The granting of such permission is not to be treated by a Magistrate as a mere matter of routine but it is an exercise of his judicial discretion having regard to the policy underlying it. *H. N. Rishbud* v. *State of Delhi*. **A I R 1955 S C 196.**

(1333) *S. 6—Essentials of sanction.*

It is not necessary for the sanction under the Prevention of Corruption Act to be in any particular form or in writing or for it to set out the facts in respect of which it is given. The desirability of such a course is obvious because when the facts are not set out in the sanction proof has to be given aliunde that sanction was given in respect of the facts constituting the offence charged, but an omission to do so is not fatal so long as the facts can be, and are, proved in some other way:

Held that it was evident from the evidence that the facts placed before the Government could only relate to offences under S. 161, of the Indian Penal Code and Cl. (a) of S. 5 (1) of the Prevention of Corruption Act. They could not relate to Cl. (b) or (c). When the sanction was confined to S. 5 (2) it could not, in the circumstances of the case, have related to anything but Cl. (a) of sub-s. (1) of S. 5. Therefore, the omission to mention Cl. (a) in the sanction did not invalidate it: A I R 1948 P C 82, *Rel. on. Biswabhushan* v. *State of Orissa*, **A I R 1954 S C 359 =1954 S C J 537.**

(1334) *S. 6 (1) (c)—Sanction — Validity—(Penal Code (1860), S. 161).*

Letter of sanction signed by Personal Assistant of Sanctioning authority—Personal Assistant examined as witness proving another document which purported to be draft of letter of which sanctioning letter was copy — Draft signed by Sanctioning authority below the word "approved"—Sanction held was in fact given, though the form was not proper. *Madan Mohan* v. *State of Uttar Pradesh*, **A I R 1954 S C 638.**

(1335) *S. 6 (1) (c)—Sanction—Facts on which proposed prosecution is based must be proved to have been put before the Sanctioning authority — (Penal Code (1860), S. 161).*

The burden of proving that the requisite sanction has been obtained rests on the prosecution and such burden includes proof that the Sanctioning authority had given the sanction in reference to the facts on which the proposed prosecution was to be based; and these facts may appear on the face of the sanction or may be proved by extraneous evidence. Where the facts constituting the offence do not appear on the face of the letter sanctioning prosecution, it is incumbent upon the prosecution to prove by other evidence that the material facts constituting the offence were placed before the sanctioning authority. Where this is not done, the sanction must be held to be defective and an invalid sanction cannot confer jurisdiction upon the Court to try the case: A I R 1948 P C 82 (84), *Rel. on. Madan Mohan* v. *State of Uttar Pradesh*, **A I R 1954 S C 638.**

Preventive Detention Act (1950)

PREVENTIVE DETENTION ACT, 1950.

(1336) *See* Public Safety.

PRINCIPAL AND AGENT

See also Contract Act.

(1337) *Possession of agent or servant—When possession of principal or master—Master and Servant.*

In order that the possession of the servant or agent may be juridically regarded as the possession of the master and principal, the servant or agent must be obedient to, and amenable to the directions of, the master or principal. If the master or principal has no hand in the appointment of the servant or agent or has no control over him or has no power to dismiss or discharge him, the possession of such servant or agent can hardly, in law, be regarded as the possession of the principal or master. *Charanjit Lal* v. *Union of India* **A I R 1951 S C 41 =1951 S C J 29 =1950 S C R 869.**

PROVIDENT FUNDS ACT (1925)

(1338) *Ss. 2 (a), 3 (1) — Compulsory deposit—Fund at credit of retired servant — Not liable to attachment — No receiver can be appointed — (Civil P. C. (1908), S. 60 (K)).*

The definition in S. 2 (a), Provident Funds Act, makes it clear that the provident fund amount not paid to the subscriber after the date of his retirement is also a compulsory deposit. Such a deposit cannot be assigned or charged and is not liable to attachment under S. 3 (1) of the Provident

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Funds Act. It is exempt from attachment and sale also under S. 60 (k), Civil P. C. Normally no execution can lie against such a sum nor can a receiver be appointed for collecting the money.

The prohibition against the assignment or the attachment of such compulsory deposits is based on grounds of public policy. Where the interdiction is absolute, to allow a judgment-creditor to get at the fund indirectly by means of the appointment of a receiver would be to circumvent the statute and to frustrate the very object of the legislation : (1887) 18 Q B D 127, *Rel. on.* : A I R 1951 Cal 25, *Reversed* ; A I R 1925 P C 176, *Disting. Case law referred. Union of India* v. *Hira Devi*,

A I R 1952 S C 227
=1952 S C R 765=1952 S C J 326.

PROVINCIAL INSOLVENCY ACT (1920) (AS AMENDED IN 1948).

(1339) *S. 28A—Has retrospective effect — Fathers power to alienate son's share vests in Receiver.*

Under the new S. 28A the powers of a father under the Mitakshara Law to alienate the joint family property including the interest of his sons in the same for discharge of an antecedent debt not contracted for illegal or immoral purposes vests in the Receiver on the adjudication of the father as an insolvent. Section 28A has retrospective operation : A I R 1946 Mad 434, *Reversed. Nageshwar Swami* v. *Vishwasundara*,

A I R 1953 S C 370
=1953 S C R 894=1953 S C J 539.

PUBLIC SAFETY

BOMBAY PUBLIC SECURITY MEASURES ACT (VI OF 1947).

(1340) *S. 12—Cases referred to Special Judge before Constitution — Validity of special procedure after coming into force of Constitution — (Constitution of India, Arts. 14, 13 (1)).*

(Majority view, *Patanjali Sastri C. J.*, Contra): — If in the absence of any special provision to the contrary, no person has a vested right in procedure, it must follow as a corollary that nobody has a vested liability in matters of procedure in the absence of any special provision to the contrary. If this is the position when the law of procedure is altered by statute, the position would not be different when the Act prescribing the discriminatory procedure be-

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comes void by reason of its repugnancy to the equal protection clause of the Constitution. Although the substantive rights and liabilities acquired or accrued before the date of the Constitution remain enforceable nobody can claim after that date, that those rights or liabilities must be enforced under that particular procedure although it has, since that date, come into conflict with the fundamental right of equal protection of laws guaranteed by Art. 14: A I R 1951 S C 128, *Ref.*

The special procedure prescribed by the Bombay Act constitutes a departure from the ordinary law of procedure and is, in some important respects, detrimental to the interest of the persons subjected to it and as such is discriminatory. As the Act was valid in its entirety before the date of the Constitution, that part of the proceedings before the Special Judge, which, up to that date, had been regulated by this special procedure cannot be questioned, however discriminatory it may have been, but the continuation of the application of the discriminatory procedure to their cases after the date of the Constitution constitutes a breach of their fundamental right guaranteed by Art. 14 and being inconsistent with the provisions of that Article the special procedure becomes void under Art. 13 and as there is no vested right or liability in matters of procedure the accused are entitled to be tried according to the ordinary procedure after the date of the Constitution :

Held that the conviction of the accused on trial after the date of the Constitution according to the special procedure and the sentences passed on them could not be supported and were set aside : A I R 1927 P C 57, *Disting.*

(Per *Patanjali Sastri C. J.*) : — Equal protection of the laws under Art. 14 postulates persons in the same situation and in the same circumstances claiming that the same law should be applied to them. In this case it could not be said that the accused whose trial by the Special Judge had been lawfully commenced and was pending at the commencement of the Constitution, were in the same situation with persons who committed the same offences after the Constitution came into force and no complaint of discriminatory treatment by reason only of the trial having been continued

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under the special procedure can be sustained, even assuming that the ordinary procedure under the Criminal Procedure Code became applicable to the accused on and after 26th January 1950.

In view of S. 1 (2), Cr. P. C., however, it could not be said that on the 26th January 1950 the accused were in a position to claim that they were entitled to be tried under the ordinary procedure like those who committed the same offences after that date or who, having committed them before such date, had not been directed to be tried by the Special Judge.

Further the jurisdiction of the Special Judge which was validly created and exercised over the case did not cease to continue on and after 26-1-1950 as he was merely 'working out' the application of the Bombay Act and there was nothing which affected the competency of the Special Judge to try the case after 26-1-1950 : A I R 1927 P C 97, *Disting. Lakshman Dàss* v. *State of Bombay*, **A I R 1952 S C 235 =1952 S C R 710=1952 S C J 339.**

(1341) *S. 12—Validity—Section is unconstitutional as contravening Act 14 of the Constitution — (Constitution of India, Art. 14).*

(Majority view ; *Patanjali Sastri C. J., Dissenting)* : — Article 14 condemns discrimination not only by a substantive law but also by a law of procedure.

The Bombay Act, besides providing for enhanced punishment and whipping, eliminates the committal proceedings, permits the Special Judge to record only a memorandum of the evidence, confers on him a larger power to refuse to summon a defence witness, than what is conferred on a Court by S. 257 (1), Criminal P. C. and also deprives the accused of his right to apply for a transfer or for revision. These departures from the ordinary law cause prejudice to persons subjected to the procedure prescribed by the Act and constitute a discrimination against the persons tried by the Special Judge. In view of these departures from the ordinary law brought about by the Bombay Act, S. 12 of the Act in so far as it authorises the Government to direct specific and particular 'cases' to be tried by the Special Judge is constitutional and void.

Public Safety — City of Bombay Police Act (1902)

A I R 1952 S C 75 and A I R 1952 S C 123, *Rel. on.*

(Per *Patanjali Sastri C. J.)*: The procedural variations brought about by the Bombay Act in the recording of evidence and the summoning of witnesses are not so serious as to amount to a denial of the equal protection of the laws within the meaning of Art. 14. Even if the accused were to be tried under the normal procedure of the Criminal P. C., after 26th January 1950, the omission to record the evidence in full and the refusal to summon a witness in the circumstances mentioned in S. 13 of the Bombay Act may well be regarded as mere irregularities curable under S. 537 of the Code. As regards transfer, it does not fit in with the scheme of trial before Special Judge, and, unless any system of trials by Special Court is to be condemned as violative of Art. 14, a prohibition of transfer cannot be regarded as falling within the inhibition of Art. 14. *Lakshman Dass* v. *State of Bombay*,

A I R 1952 S C 225 =1952 S C R 710=1952 S C J 339.

CITY OF BOMBAY POLICE ACT (4 OF 1902)

(1342) *S. 27 (1)—Validity—Discrimination in procedure — Discrimination is based upon reasonable classification — Constitution of India, Art. 14.*

It is true that a procedure different from what is laid down under the ordinary law has been provided for a particular class of persons against whom proceedings could be taken under S. 27 (1) of the City of Bombay Police Act. But the discrimination, if any, is based upon a reasonable classification which is within the competency of the legislature to make. Having regard to the objective which the legislation has in view and the policy underlying it, a departure from the ordinary procedure can certainly be justified as the best means of giving effect to the object of the legislature. In that view, S. 27 (1) does not contravene Art. 14 of the Constitution. *Gurbachan Singh* v. *State of Bombay*,

A I R 1952 S C 221 =1952 S C R 737=1952 S C J 321.

(1343) *S. 27 (1)—Validity — Restrictions by S. 27 (1) upon fundamental right*

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of free movement are reasonable—Constitution of India, Art. 19 (1) (d) and (5).

There can be no doubt that the provision of S. 27 (1) of the Bombay Act was made in the interest of the general public and to protect them against dangerous and bad characters whose presence in a particular locality may jeopardize the peace and safety of the citizens. The restrictions that this law imposes upon the rights of free movement of a citizen, are reasonable and come within the purview of clause 5 of Art. 19 of the Constitution.

The maximum duration of the externment order made under S. 27 (1) of the Bombay Act is a period of two years and the Commissioner of Police can always permit the externee to enter the prohibited area even before the expiration of that period. Having regard to the class of cases to which this sub-section applies and the menace which an externment order passed under it is intended to avert, it is difficult to say that this provision is unreasonable.

So far as procedure to be followed is concerned, it is true that the suspected person is not allowed to cross-examine the witnesses who deposed against him and on whose evidence the proceedings were started. But this by itself would not make the procedure unreasonable having regard to the avowed intention of the legislature in making the enactment. The law is certainly an extraordinary one and has been made only to meet those exceptional cases where no witnesses for fear of violence to their person or property are willing to depose publicly against certain bad characters whose presence in certain areas constitute a menace to the safety of the public residing therein. This object would be wholly defeated if a right to confront or cross-examine these witnesses was given to the suspect. The power to initiate proceedings under the Act has been vested in a very high and responsible officer and he is expected to act with caution and impartiality while discharging his duties under the Act. *Gurbachan Singh* v. *State of Bombay*,

A I R 1952 S C 221
=1952 S C R 737=1952 S C J 321.

(1344) *S. 27 (1) — Scope — Order of externment directing petitioner to leave Greater Bombay and go to Amritsar—Construction—Petitioner requesting Police to permit him to stay at Kalyan—Request granted—Order held must be construed as*

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one of externment from Greater Bombay and not from State of Bombay.

Two kinds of externment orders are contemplated by S. 27 (1): one where externment is directed from Greater Bombay and the other where the externee is to remove himself from the State of Bombay. In the first class of cases, the order has got to specify the place where the externee is to remove himself to and it must also indicate the route by which he has to reach that place. On the other hand, when the externment is from the State of Bombay, the externee can remain anywhere he likes outside the State and no place of residence can or need be mentioned.

An externment order directed the petitioner to remove himself out of Greater Bombay and go to his native place at Amritsar. The petitioner himself sought permission of the Commissioner of Police to stay at Kalyan which is within the State of Bombay, and the request was acceded to and the Police actually took the petitioner to Kalyan.

'*Held*' that the direction in the order to go to Amritsar indicated that the real intention of the order was to direct the externee to remove himself not only from Greater Bombay but from State of Bombay itself. In that view, the mention of the place of residence in the order was irregular. But whatever irregularity there might have been in the original order, was removed by the subsequent conduct of the petitioner which had the sanction and approval of the Commissioner of Police. In those circumstances, the externment order might be construed to be an order of externment from Greater Bombay and though there was a mistake regarding the place where the externee was to remove himself, the mistake was rectified by the petitioner choosing Kalyan as the place of residence and that choice being accepted and given effect to by Police Department. *Gurbachan Singh* v. *State of Bombay* **A I R 1952 S C 221**
=1952 S C R 737=1952 S C J 321.

EAST PUNJAB PUBLIC SAFETY ACT (5 of 1949)

(1345) *Ss. 3 (4), 4 (6) — Representation to advisory board — No provision as to powers of board — Act not invalid on that ground.*

A reference to the advisory board constituted under S. 3 (4) necessarily implies a consideration of the case by such board.

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The absence of an express statement to that effect in the impugned Act does not invalidate the Act. *N. B. Khare* v. *State of Delhi*,

A I R 1950 S C 211
=1950 S C J 328
=1950 S C R 519.

(1346) *East Punjab Public Safety Act (5 of 1950), S. 4 (6)—Grounds of externment—Communication to externee—Right whether given by S. 4 (6) — Validity of S. 4 (6).*

(*Majority view; Mukherjea and Mahajan JJ.*, dissenting.) — While the word "may" ordinarily conveys the idea of a discretion and not compulsion, reading it with the last part of the clause it seems that when an externment order has to be enforced for more than three months an absolute right is given to the externee to make a representation. He cannot make a representation unless he has been furnished grounds for the order. In no other part of the Act a right to obtain the grounds for the order in such a case is given to him. Therefore that right has to be read as given under the first part of S. 4 (6).

Per *B. K. Mukherjea J.* — First part of sub-s. (6) of S. 4 makes it entirely optional with authorities to communicate the grounds, upon which the order is made, to the person affected by it. The grounds need not be communicated at all if the authorities so desire. As regards the right of representation the latter part of the sub-section seems to imply that when the order is to remain in force for more than 3 months, the right of representation should be given to the aggrieved person and the representation shall be referred for consideration to the Advisory Tribunal constituted under S. 3, sub-s. (4) of the Act. The right, however, is purely illusory as would appear from the fact that even in cases where the order is to be operative for more than three months, there is no obligation on the part of the authorities to communicate to the person the grounds upon which the order was made. This sub-section, therefore, cannot be said to have imposed restrictions which are reasonable in the interests of the general public and under Art. 13 (1) of the Indian Constitution has become void and inoperative after the Constitution came into force. *N. B. Khare* v. *State of Delhi*,

A I R 1950 S C 211
=1950 S C J 328
=1950 S C R 519.

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(1347) *East Punjab Public Safety Act (5 of 1949), S. 7 (i) (c) — Validity of — Constitution of India, Arts. 19 (1) (a) and (2) and 32.*

The Chief Commissioner of Delhi issued an order under S. 7 (i) (a), East Punjab Public Safety Act, against the printer, publisher and editor of the English weekly of Delhi called the Organizer directing them 'to submit for scrutiny in duplicate before publication, till further orders, all communal matter and news and views about Pakistan including photographs and cartoons other than those derived from official sources or supplied by the news agencies . . . . . .' The applicants, the printer, publisher and editor, applied under Art. 32 of the Constitution for issue of a writ of *certiorari* and prohibition against the Chief Commissioner: *Held* (Per majority, *Fazl Ali J.* Contra) — That the imposition of pre-censorship on the journal was undoubtedly a restriction on the liberty of the press which is an essential part of the right to freedom of speech and expresssion declared by Art. 19 (1) (a) and for the reasons indicated in the Supreme Court judgment in Petn. No. 16 of 1950 : (A I R 1950 S C 124), S. 7 (i) (c) which authorised the imposition of such restriction fell outside the reservation of Art. 19 (2) and as such was void. The impugned order of the Chief Commissioner should therefore be quashed. *Brij Bhushan* v. *State of Delhi*,

A I R 1950 S C 129=1950 S C J 425

PREVENTIVE DETENTION ACT (1950)

(1348) — *Validity.*

The Preventive Detention Act is not *ultra vires* the constitution with the exception of S. 14 which, being severable from the rest of the Act, does not affect the validity of the latter in any way : A I R 1950 S C 27, *Foll. Ashutosh* v. *State of Delhi*,

A I R 1953 S C 451.

(1349) *Prevention Detention Act (1950), Ss. 1, 12 and 14 — Act whether* ultra vires *the Constitution of India — Constitution of India, Art. 22 (7) (a).*

The Preventive Detention Act, 1950, is *intra vires* the Constitution with the exception of S. 14 which is illegal and *ultra vires*. The invalidity of S. 14 does not affect the rest of the provisions in the Act.

Per *Fazl Ali J. and Mahajan J.* — Section 12 of the Act also does not conform to the provisions of the Constitution of India and is therefore *ultra vires*.

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[*Editorial Note.* — By S. 3, Preventive Detention (Amendment) Ordinance, 1950 (No. 19 of 1950), S. 14, Preventive Detention Act, 1950 (4 of 1950) is *omitted.* This Ordinance is promulgated by the President on 23rd June 1950 and is printed in the Gazette of India, Extraordinary of that date, Part II, S. 1, p. 207.]. *Gopalan* v. *State of Madras,* **A I R 1950 S C 27 =1950 S C J 174 =1950 S C R 88.**

(1350) *Preventive Detention Act (1950), S. 3* — Mala fide *order.*

There can be no better proof of *mala fides* on the part of the executive authorities than a use of the extraordinary provisions contained in the Act for purposes for which ordinary law is quite sufficient. *Ashutosh* v. *State of Delhi,* **A I R 1953 S C 451.**

(1351) *Preventive Detention Act (1950), S. 3 — Subsequent order of detention mentioning same grounds as in prior order of detention—Detenu all the while in jail in intervening period—Subsequent order cannot be said to be* mala fide.

If while the detenu is in jail under a prior order of detention under a provincial Act, a subsequent order of detention under the Preventive Detention Act is passed against him after several months mentioning the same grounds as in the prior order it cannot be said that the subsequent order is *mala fide* or passed mechanically without proper satisfaction. The past conduct or antecedent history of a person can be taken into account when making a detention order, and, as a matter of fact, it is largely from prior events showing the tendencies or inclinations of the man that an inference could be drawn whether he is likely even in the future to act in a manner prejudicial to the maintenance of public order. If the authority satisfied himself that the original ground was still available and that there was need for detention on its basis, no *mala fides* can be attributed to the authority from this fact alone. *Ujagar Singh* v. *State of Punjab,* **A I R 1952 S C 350 =1952 S C R 756 =1952 S C J 521.**

(1352) *Preventive Detention Act (1950), S. 3 — Satisfaction of detaining authority —*Mala fides*—Evidence Act (1872), Ss. 101 and 103.*

The satisfaction of the authority making the order as to the matters specified in the Act is the only condition for the exercise of

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his powers and the Court cannot substitute its own satisfaction for that of the authority. It is, however, open to the detenu to establish, if he can, that the order was made *mala fide* and in abuse of powers and the order of detention may be declared invalid if it could be proved to have been made by the authorities concerned in *mala fide* exercise of their power. The burden of proving the absence of good faith is upon the detenu and it is certainly a heavy burden to discharge. Mere suspicion is, however, not proof. *Ashutosh* v. *State of Delhi,* **A I R 1953 S C 451.**

(1353) *Preventive Detention Act (1950), S. 3 — Grounds of detention — Propriety or reasonableness of satisfaction of detaining authority if can be questioned.*

The propriety or reasonableness of the satisfaction of the Central or the State Government upon which an order for detention under S. 3, Preventive Detention Act is based, cannot be raised and the Supreme Court cannot be invited to undertake an investigation into sufficiency of the matters upon which such satisfaction purports to be grounded. The Supreme Court can, however, examine the grounds disclosed by the Government to see if they are relevant to the object which the legislation has in view, namely, the prevention of objects prejudicial to the defence of India or to the security of State and maintenance of law and order therein. *Sodhi Shamsher Singh* v. *State of Pepsu,* **A I R 1954 S C 276.**

(1354) *Preventive Detention Act (1950), S. 3—Failure of one of the grounds for detention — Validity of detention.*

The power to issue a detention order under S. 3 of the Preventive Detention Act depends entirely upon the satisfaction of the appropriate authority specified in that section. The sufficiency of the grounds upon which such satisfaction purports to be based, provided they have a rational probative value and are not extraneous to the scope or purpose of the legislative provision, cannot be challenged in a Court of law, except on the ground of mala fides. A Court of law is not even competent to enquire into the truth or otherwise of the facts which are mentioned as grounds of detention in the communication to the detenu under S. 7 of the Act: A I R 1951 S C 157, *Rel on.*

Where however the Government itself while confirming the detention in exercise

of its powers under S. 11 admits that one of the two grounds mentioned in the orginal order is unsubstantial or non-existent to say that the other ground, which still remains, is quite sufficient to sustain the order would be to substitute an objective judicial test for the subjective decision of the executive authority which is against the legislative policy underlying the statute. In such cases, the position would be the same as if one of these two grounds was irrelevant for the purpose of the Act or was wholly illusory and this would vitiate the detention order as a whole. A I R 1943 F C 72, *Rel. on. Shibban Lal* v. *State of U. P.*

A I R 1954 S C 179=1954 S C R 418 = 1954 S C J 73.

(1355) Preventive Detention (Amendment) Act (1952), S. 3 — Classification made by Section is reasonable and fair — Classification is not hit by equality clause in Art. 14 of Constitution — (Constitution of India, Art. 14). *Sham Rao* v. *District Magistrate, Thana,*

A I R 1952 S C 324=1952 S C R 683 = 1952 S C J 476.

(1356) Preventive Detention (Amendment) Act (1952), S. 3 — Section is intra vires.' *Sham Rao* v. *District Magistrate Thana,*

A I R 1952 S C 324=1952 S C R 683 = 1952 S C J 476.

(1357) *Preventive Detention (Amendment) Act (1952), S. 3 — Indefinite detention — Repugnancy to Constitution — Constitution of India, Art. 22 (7) (a)).*

It cannot be said that S. 3 is repugnant to the Constitution, and in any event a fraud upon it as it fixes no time limit, because the section specifies the exact period of the detention, namely till the expiry of the Preventive Detention Act, 1950, that is to say, till the 1st of October 1952. Nor is it repugnant to the Constitution on the ground that Parliament is enabled to continue detentions indefinitely by the expedient of periodic amendments in the Act of 1950, because Parliament has the power. *Sham Rao* v. *District Magistrate Thana,*

A I R 1952 S C 324=1952 S C R 683 = 1952 S C J 476.

(1358) *Preventive Detention Act (1950), S. 3 — Proof of 'satisfaction' of Minister —Affidavit by his Secretary—Sufficiency —(Evidence Act (1872), S. 14).*

As matter of abstract law, the state of man's mind can be proved by evidence other than that of the man himself, and if the Home Secretary has the requisite means of knowledge, for example, if the Minister had told him that he was satisfied or he had indicated satisfaction by his conduct and acts, and the Home Secretary's affidavit was regarded as sufficient in the particular case, then that would constitute legally sufficient proof of the satisfaction of the Home Minister. But whether that would be enough in any given case, or whether the "best evidence rule" should be applied in strictness in that particular case, must necessarily depend upon its facts. *State of Bombay* v. *Purushottam Jog,*

A I R 1952 S C 317 = 1952 S C R 674 = 1952 S C J 503.

(1359) *Preventive Detention Act (4 of 1950), S. 3 — Preventive detention—Satisfaction of Government—Question of satisfaction if can be challenged—Constitution of India, Art. 22 (5).*

According to the wording of S. 3, before the Government can pass an order of preventive detention it must be satisfied with respect to the individual person that his activities are directed against one or other of the three objects mentioned in the section, and that the detaining authority was satisfied that it was necessary to prevent him from acting in such a manner. The wording of the section thus clearly shows that it is the satisfaction of the Central Government or the State Government on the point which alone is necessary to be established.

The satisfaction of the Government must be based on some grounds. There can be no satisfaction if there are no grounds for the same. If the grounds on which it is stated that the Central Government or the State Government was satisfied are such as a rational human being can consider connected in some manner with the objects which were to be prevented from being attained, the question of satisfaction except on the grounds of *mala fides* cannot be challenged in a Court. *State of Bombay* v. *Atma Ram,*

A I R 1951 S C 157 = 1951 S C J 208 = 1951 SC R 167.

(1360) *Preventive Detention Act (1950), S. 3 — Vagueness of grounds — Satisfaction of authority — Constitution of India, Art. 22 (5).*

Vague grounds do not stand on the same footing as irrelevant grounds. An irrelevant

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ground has no connection at all with the satisfaction of the State Government making the order of detention. Further it cannot be said that if the grounds are vague and no representation is possible there can be no satisfaction of the authority as required by S. 3. The sufficiency of the grounds, which gives rise to the satisfaction of the State Government is not a matter for examination by the Court. The sufficiency of the grounds to give the detained person the earliest opportunity to make a representation can be examined by the Court but only from that point of view. The quality and characteristic of the grounds need not be the same for both tests. One person may be, but another may not be satisfied on the same grounds. That aspect, however, is not for the determination of the Court. The second part of the inquiry is clearly open to the Court under Art. 22 (5). Even if the grounds are not sufficient or adequate for making the representation, the grounds may still be sufficient for the subjective satisfaction of the authority. *Tarapada De* v. *State of West Bengal*, **A I R 1951 S C 174 = 1951 S C J 233 =1951 S C R 212.**

(1361) *Preventive Detention Act (1950), S. 3 — Instances of past activities if relevant.*

Instances of past activities are relevant to be considered in giving rise to the subjective mental conviction of the detaining authority that the persons to be detained are likely to indulge in objectionable activities. *Bhim Sen* v. *State of Punjab*, **A I R 1951 S C 481 =1951 S C J 747=1952 S C R 18.**

(1362) *Preventive Detention Act (1950), (as amended by Act IV [4] of 1951), S. 3 — Subjective satisfaction of detaining authority — Effect of amending Act of 1951.*

Where the grounds given for the detention are relevant, the question whether they are sufficient or not is not for the decision of the Court. The Legislature has made only the subjective satisfaction of the authority making the order essential for passing the order. The satisfaction for making the initial order is and has always been under the Preventive Detention Act, that of the authority making the order. Because the Amending Act of 1951 establishes a supervisory authority, that discretion and subjective test is

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not taken away and by the establishment of the Advisory Board the Court is not given the jurisdiction to decide whether the subjective decision of the authority making the order was right or not. *Bhim Sen* v. *State of Punjab*, **A I R 1951 S C 481 =1951 S C J 747=1952 S C R 18.**

(1363) *Preventive Detention Act (1950), S. 3 — Satisfaction — Large number of detention orders passed overnight.*

Per *Das J.*—Where the authorities had already applied their minds to the suspected activities of each of the several detenus and were satisfied as to the necessity of detaining them but there being doubts as to the validity of the local Acts and the Preventive Detention Act having been passed in the meantime the question was to make fresh orders under the new Act :

Held, that under the circumstances it could not be said that the fact that a large number of fresh orders of detention were made "overnight" indicated bad faith on the part of authorities. *Tarapada De* v. *State of West Bengal*, **A I R 1951 S C 174=1951 S C J 233 =1951 S C R 212.**

(1364) *Preventive Detention Act (1950), S. 3 — Objective standard of conduct — Failure to make provision of, whether affects section.*

Per *Kania C. J. and Patanjali Sastri J.* —Section 3 cannot be impugned on the ground that it does not provide an objective standard which the Court can utilize for determining whether the requirements of law have been complied with. The reason is that no such objective standard of conduct can be prescribed, except as laying down conduct tending to achieve or to avoid a particular object. For preventive detention, action must be taken on good suspicion. It is a subjective test based on the cumulative effect of different actions, perhaps spread over a considerable period. For the purposes of *preventive* detention, it would be difficult, if not impossible to lay down objective rules of conduct failure to conform to which should lead to such detention. As the very term implies, the detention in such cases is effected with a view to prevent the person concerned from acting prejudicially to certain objects which the legislation providing for such detention has in view. *Gopalan* v. *State of Madras*, **A I R 1950 S C 27=1950 S C J 174 =1950 S C R 88.**

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(1365) Preventive Detention Act. (1950), S. 3— Order of Detention — *Mala fides* of detaining authority —Onus of proof— Burden is on detenu. *Ram Singh* v. *State of Delhi*, **A I R 1951 S C 270 =1951 S C J 371=1951 S C R 451.**

(1366) *Preventive Detention Act (1950), as amended by Act (IV [4] of 1951), Ss. 3 (1), 9 and 11 —Fixing of period of detention in initial order itself — Order cannot be supported.*

It is clear that the Preventive Detention Act (1950) as amended requires that every case of detention should be placed before an Advisory Board constituted under the Act (S. 9) and provides that if the Board reports that there is sufficient cause for the detention "the appropriate Government may confirm the detention order and continue the detention of the person concerned for such period as it thinks fit "(S. 11). It is, therefore, plain that it is only after the Advisory Board, to which the case has been referred, reports that the detention is justified, the Government should determine what the period of detention should be and not before. The fixing of the period of detention in the initial order itself is, therefore, contrary to the scheme of the Act and cannot be supported. *Makhan Singh Tarsikha* v. *State of Punjab (1)*, **A I R 1952 S C 27 =1952 S C R 368.**

(1367) *Preventive Detention Act (1950), S. 3 (1) (a) — Ground in case held to be covered by section.*

Where the gravamen of the charge against the petitioner was that he aimed at setting up a parallel government in the Uran Peta area and that in order to achieve that end he did various acts such as intimidating the workers in the salt pans with threats of murder and his own workers with threats of death, unless they carried out his orders; and among the lesser instances given to illustrate the exercise of parallel governmental authority were the ones set out in the first ground, namely the infliction of fines with the sanction of excommunication and boycott to ensure their payment and due obedience to his orders:

Held, that the ground was covered by S. 3 (1) (a). *Sham Rao* v. *District Magistrate Thana*, **A I R 1952 S C 324 =1952 S C J 476=1952 S C R 683.**

(1368) *Preventive Detention Act (1950), Ss. 3 and 7—Detention order purporting to be made by Governor and signed by*

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Home Secretary — Communication of grounds—By whom to be made — (Constitution of India Art. 166 (1)).

Where orders of detention expressly state that the Governor of Punjab was satisfied of their necessity and that they were made by his order, the mere fact that they are signed by the Home Secretary would not make them defective. The communication of the grounds need not be made directly by the authority making the order. Section 7 does not require this. The communication may be through recognized channels prescribed by the administrative rules of business. *Ujagar Singh* v. *State of Punjab*, **A I R 1952 S C 350=1952 S C J 521 =1952 S C R 756.**

(1369) *Preventive Detention Act, (1950) Ss. 3, 12 — Order of detention not specifying period — Validity.*

Even if the order of detention passed under section 3 does not specify the period during which the detenus are to be under detention, the order is not invalid as S. 12 prescribes a maximum period of one year and hence such orders cannot be said to be of indefinite period or unlawful on that ground. Petn. Nos. 149 and 167 of 1950 (S. C.), *Rel. on. Ram Singh* v. *State of Delhi*, **A I R 1951 S C 270 =1951 S C J 471=1951 S C R 451.**

(1370) *Preventive Detention Act (1950), S. 4 (a) — Punjab Communist Detenus Rules, 1950, Rules 40 and 41—Procedure under, not governed by Prisons Act (1894), Ss. 45, 46 and 52.*

The Punjab Communist Detenus Rules 1950 constitute a self-contained code regulating the place and conditions of detention of the detenus. Hence Ss. 45, 46 and 52 do not apply to their case. *Maqbool Hussain* v. *State of Bombay*, **A I R 1953 S C 326 =1953 S C J 456=1953 S C R 730.**

(1371) *Preventive Detention Act (1950), S. 7 — Communication of supplementary grounds.*

A description of the contents of the second communication of the grounds for detention as "supplementary grounds" does not necessarily make them additional or new grounds. One has to look at the contents to find out whether they are new grounds. When they only furnish details of the grounds furnished to the detenu previously, they cannot be treated as new grounds. Further the fact that the details were communicated later

does not necessarily show that they were not within the knowledge of the authorities when they sent the first communication of grounds. *Tarapada De* v. *State of West Bengal*, **A I R 1951 S C 174 =1951 S C J 233=1951 S C R 212.**

(1372) *Preventive Detention Act (1950), S. 7—Communication of grounds— When to be made—Delay in furnishing grounds —Effect.*

The Act does not fix the time within which the grounds should be furnished to the person detained. It merely states that the communication must be "as soon as may be." This means reasonable despatch and what is reasonable must depend on the facts of each case. No arbitrary time limit can be set down.

When the long delay in furnishing the grounds has been adequately explained, the detention cannot be held unlawful on that ground. *Ujagar Singh* v. *State of Punjab*, **A I R 1952 S C 350=1952 S C J 521 =1952 S C R 756.**

(1373) *Preventive Detention Act (1950), S. 7—Communication of vague grounds— Inexcusable delay in supplying particulars —Detenu is entitled to be released.*

Mere vagueness of grounds standing by itself and without leading to an inference of mala fides or lack of good faith is not a justiciable issue in a Court of law for the necessity of making the order, inasmuch as the ground or grounds on which the order of detention was made is a matter for the subjective satisfaction of the Government or of the detaining authority; there is nothing in the Act to prevent particulars of the grounds being furnished to the detenu within a reasonable time so that he may have the earliest opportunity of making a representation against the detention order—what is reasonable time being dependent on the facts of each case; failure to furnish grounds with the speedy addition of such particulars as would enable the detenu to make a representation at the earliest opportunity against the detention order can be considered by a Court of law as an invasion of a fundamental right or safeguard guaranteed by the Constitution, viz., being given the earliest opportunity to make a representation; and no new grounds can be supplied to strengthen or fortify the original order of detention. A I R 1951 S C 157, *Rel. on.*

Where the petitioners were given only vague grounds which were not particularised

or made specific so as to afford them the earliest opportunity of making representations against their detention orders, and there having been inexcusable delay in acquainting them with particulars of what was alleged, the petitioners were held entitled to be released. *Ujagar Singh* v. *State of Punjab*, **A I R 1952 S C 350. =1952 S C R 756=1952 S C J 521.**

(1373A) *Preventive Detention (Amendment) Act (1951), Ss. 9 (2) & 12 (1) — Validity — Sections substantially satisfy requirements of Art. 22 (4) (b) & are valid.*

The combined effect of Ss. 9 (2) (a) & 12 (1) of the Amending Act of 1951 is to provide, in a certain class of cases, namely, where detention orders were in force at the commencement of the new Act, that the person concerned could be detained for a period longer than three months if an Advisory Board reports that there are sufficient grounds for detention, within ten weeks from the commencement of the new Act, that is to say, without obtaining the opinion of an Advisory Board before the expiration of the three months from the commencement of the detention as provided in sub-cl. (a) cl. (4). And although the new Act does not in express terms prescribe in a separate provision any maximum period as such for which any person may in any class or classes be detained, it fixes, by extending the duration of the old Act till 1-4-1952, an over-all time-limit beyond which preventive detention under the Act cannot be continued. These sections, therefore, substantially satisfy the requirements of sub-cl. (b) of cl. (4) of Art. 22, & cannot be declared unconstitutional and void.

Per *Mahajan J.* — Technically speaking, an amended statute remains the same statute as originally enacted but from that proposition it does not follow that the law contained in the amended statute is the same law as was contained in the original one. The law declared by Ss. 9 and 12 of the amended statute is not the same law as was declared by the original statute & to that extent the amended statute is in the nature of a new and independent statute. The new law admittedly standing by itself does not authorize detention of any person beyond a period of three months except in the manner provided by Art. 22 (4) of the Constitution. No question whatever arises of tacking of the period of detention under one law to the period of detention under

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another law, inasmuch as the detention under the earlier law automatically terminates with the repeal of S. 12 of Act 4 of 1950. These sections therefore, do not contravene Art. 22 (4) of the Constitution. *S. Krishnan* v. *State of Madras*,

A I R 1951 S C 301 =1951 S C J 453=1951 S C R 621.

(1373B) *Preventive Detention Act (1950), S. 10 — Jurisdiction of Advisory Board.*

Where a statement of fact contained in the affidavit filed in Court by the detaining authority is disputed, the matter has to be considered by the Advisory Board. The question of the truth of that statement is not within the jurisdiction of the Court to decide. *Bhim Sen* v. *State of Punjab*,

A I R 1951 S C 481 =1951 S C J 747=1952 S C R 18.

(1374) *Preventive Detention Act (1950), S. 11—Duty of Government.*

Where the original order for detention was under sub-cls. (ii) and (iii) of S. 3 (1) (a) and the Government in exercise of its power under S. 11 confirmed the detention under sub-cl. (ii) but revoked the detention under sub-cl. (iii) on the ground that the Advisory Board did not uphold the detention under that sub-clause:

Held that the order was not in conformity with S. 11 under which Government could either confirm the order of detention made under S. 3 or revoke it completely and that there was nothing in law which prevented the Government from making a fresh order of detention if it so chose. *Shibban Lal* v. *State of U. P.*,

A I R 1954 S C 179 =1954 S C R 418=1954 S C J 73.

(1375) Preventive Detention Act (1950), (as amended by Act 61 of 1952), S. 11A (2) —"Unless shorter period is specified in the order" — Words have reference to periods mentioned immediately thereafter and not to the date of expiry of Act 34 of 1952. *Venkateswaraloo* v. *Supdt. Central Jail Hyderabad State*, **A I R 1953 S C 49 =1953 S C J 1.**

(1376) *Preventive Detention Act (1950), (as amended by Act 61 of 1952), S. 11A (2) — "The order" — Refer to order as eventually confirmed under S. 11 (1).*

The words "the order" in S. 11-A (2) refer not to the initial order of detention, for no period of detention could legally be specified in that order but to the order of

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detention as eventually confirmed under S. 11 (1). *Venkateswaraloo* v. *Supdt. Central Jail Hyderabad State*,

A I R 1953 S C 49=1953 S C J 1.

(1377) *Preventive Detention Act (1950), (as amended by Act 61 of 1952), S. 11 (1) — Order extending detention passed on 22-9-1952 in exercise of powers conferred by Act 61 of 1952 — Act passed on 22-8-1952 but coming into force on 30-9-1952— Validity of order — (General Clauses Act (1897), S. 22).*

An order extending the detention of the detenu till 31-12-1952 passed on 22-9-1952 in exercise of the powers conferred by Preventive Detention (Second Amendment) Act (61 of 1952) which was passed on 22-8-1952 but came into force on 30-9-1952 is illegal and cannot be justified by the provisions of S. 22, General Clauses Act (1897). Orders under S. 22 can only be issued with respect to the time when or the manner in which anything is to be done under the Act. An order for the extension of detention made in exercise of the powers conferred by the new Act is not an order with respect to the time when or the manner in which anything is to be done under the Act. Such an order could only be made under the Act and after the Act had come into force and not in anticipation of its coming into force. The Act having no retrospective operation it cannot validate an order made before it came into force. *Vakateswaraloo* v. *Supdt. Central Jail Hyderabad State*,

A I R 1953 S C 49=1953 S C J 1.

(1378) *Preventive Detention Act (1950), S. 11 (1)— Decision confirming detention order—Inclusion of direction for continuation of detention—Necessity.*

(Per *Das J., Patanjali Sastri C. J. concurring)*—Grammatically S. 11 (1) confers two powers, namely (1) the appropriate Government may confirm the detention order and (2) the appropriate Government may continue the detention for such period as it thinks fit. The confirmation of the detention order certainly contemplates the taking of an executive decision, but the detenu being already in custody and the detention order being confirmed his detention continues automatically and, therefore, no further executive decision is called for to continue the detention. It follows that it is not necessary to include a direction for the confirmation of the detention in the decision confirming the detention order.

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Dattatraya Moreshwar Pangarkar v. *State of Bombay*, **A I R 1952 S C 181 =1952 S C R 612=1952 S C J 235.**

(1378A) *Preventive Detention Act (1950), S. 11 (1)—"Such period as it thinks fit" — Non-specification of period — Validity of detention.*

Per *majority of the Court, Mahajan J. dissenting* — On a proper construction of S. 11 (1), a specification of the period of continuation of the detention is not necessary, however desirable one may consider it to be. Non-specification of such period at the time of confirming the detention order will not therefore make detention a nullity.

(Per Mahajan J.) — The non-determination by Government of the period of the continuance of the detention operates prejudicially against the detenus and makes the detention illegal. And the detention cannot be called in question. *Dattatraya Moreshwar Pangarkar* v. *State of Bombay*, **A I R 1952 S C 181 =1952 S C R 612=1952 S C J 235.**

(1379) *Preventive Detention Act (1950), S. 11 (1) — Confirmation order — Non-compliance with Art. 166 of Constitution —(Constitution of India, Art. 166 (1)).*

It is well settled that generally speaking the provisions of a statute creating public duties are directory and those conferring private rights are imperative. When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty and at the same time would not promote the main object of the legislature, it has been the practice of the Courts to hold such provisions to be directory only the neglect of them not affecting the validity of the acts done.

While the Preventive Detention Act requires an executive decision, call it an order or an executive action, for the confirmation of an order of detention under S. 11 (1) that Act does not itself prescribe any particular form of expression of that executive decision. Article 166 directs all executive action to be expressed and authenticated in the manner therein laid down but an omission to comply with those provisions does not render the executive action a nullity. Therefore, all that the procedure established by law requires is that the appropriate Government must take a decision as to whether the detention order should be confirmed or not under S. 11 (1). Where such decision has been in fact taken by the appropriate Government, there is no breach of the procedure established by law *Dattatraya Moreshwar Pangarkar* v. *State of Bombay* **A I R 1952 S C 181 =1952 S C R 612=1952 S C J 235.**

(1380) *Preventive Detention (Amendment) Act (1951), S. 11 (1)—Validity.*

(Majority view, Bose J., dissenting.) — As the Amending Act of 1951 is to be in force only up to 1-4-1952 & no detention under the Act can continue thereafter, the discretionary power given to the appropriate Government could be exercised only subject to that over-all limit, & therefore the validity of S. 11 (1) of the Act cannot be questioned on the ground that it authorises preventive detention for an indefinite period which is contrary to Art. 22 (4) of the Constitution. *S. Krishnan* v. *State of Madras*, **A I R 1951 S C 301 =1951 S C J 453=1951 S C R 621.**

(1381) *Preventive Detention Act (1950), Ss. 11 (1) and 13—Order under S. 11 (1) —Power to extend period of detention.*

(Per Mukherjee J., Chandrashekhar Aiyar J. concurring.)—Once the appropriate Government in making the order under S. 11 (1) specifies the period during which the detention of the person concerned is to continue, it does not become functus officio and is not incapable of extending the detention for a further period at a subsequent time if it considers necessary. S. 13 of the Act gives very wide powers to the detaining authority in this respect and it can revoke or modify any detention order at any time it chooses and the power of modification would certainly include a power of extension of the period of detention, provided such power is exercised before the period originally fixed has expired and provided the extended period does not exceed the over-all limit which is in co-existence with the life or duration of the Act itself. *Dattatraya Moreshwar Pangarkar* v. *State of Bombay*. **A I R 1952 S C 181 =1952 S C R 612=1952 S C J 235.**

(1382) *Preventive Detention Act (1950) (as amended by Act, 61 of 1952), S. 11A— Order extending detention till 30-9-1952) First Amendment Act 34 of 1952 also expiring on that date—Effect.*

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Where an order extending detention till 30-9-1952 is passed, the detention cannot continue after that date by force of the provisions of sub-s. (2) of S. 11-A merely because that date by accident or coincidence happens to be identical with the date on which the Preventive Detention (Amendment) Act, (34 of 1952) was to expire. *Venkateswaraloo* v. *Supdt. Central Jail Hyderabad State*, **A I R 1953 S C 49 =1953 S C J 1.**

(1383) Preventive Detention Act (4 of 1950), S. 11-A (2) as amended by Second Amendment Act, 61 of 1952—Applicability —Order of detention confirmed—Period not specified in order—Section 11-A (2) applies —Dates of expiry of earlier Acts (Amendment Act, 4 of 1951 and Amendment Act 34 of 1952) cannot be read into order. *Godavari* v. *State of Bombay*, **A I R 1953 S C 52 =1953 S C R 210 =1953 S C J 28.**

(1384) *Preventive Detention Act (4 of 1950), S. 11-A—Validity.*

Preventive Detention (Second Amendment) Act, 61 of 1952, extended the life of the principal Act, 4 of 1950, till 31-12-1954: Therefore in the absence of S. 11-A, all the old detentions would have been extended till that date. But S. 11A modified that period and put 1-4-1953 as the latest date for them. Section 11A, therefore, conferred a benefit and is not unreasonable. But it is inevitable that the length of detention will vary in each individual case; for it is the discretion of the Government to fix the period of detention. Classification of detentions into those before and after 30-9-1952 is, therefore, not discriminatory within the meaning of Arts. 22 (7) (b) and 14 of the Constitution and S. 11-A is not ultra vires. *Godavari* v. *State of Bombay*, **A I R 1953 S C 52 =1953 S C R 210 =1953 S C J 28.**

(1385) *Preventive Detention Act (1950), S. 12 — Detention order not specifying definite period of detention—Omission is not material rendering order invalid—(Constitution of India, Art. 22 (4) (a) and (7) (a)).*

Section 12, Preventive Detention Act, does not require that the period of detention should be specified in the order itself where the detention is with a view to preventing

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any person from acting in any manner prejudicial to the maintenance of public order. The section itself provides that he can be detained without obtaining the opinion of an Advisory Board for a period longer than three months but not exceeding one year from the date of detention. Under Art. 22 (4) (a) read with Art. 22 (7) (a) of the Constitution, detention for more than three months can be justified either on the ground of an opinion of the Advisory Board sanctioning or warranting longer detention or on the ground that the detention is to secure the due maintenance of public order, in which case it cannot exceed one year in any event as stated in S. 12, Preventive Detention Act. It is thus clear that the period is not to exceed three months generally, but may go up to one year in certain special cases. In view of these provisions, the non-specification of any definite period in the detention order is not a material omission rendering the order itself invalid. *Ujagar Singh* v. *State of Punjab*, **A I R 1952 S C 350 =1952 S C R 756 =1952 S C J 521.**

(1386) *Preventive Detention (Amendment) Act (1952), S. 3—Section does not offend Art. 22 (4) and (7) of Constitution —(Constitution of India, Art. 22 (4) and (7)).*

It cannot be contended that S. 3 offends the Constitution because Art. 22 (4) and (7) do not envisage the direct intervention of Parliament in a whole batch of cases. Parliament can prescribe the minimum period for a class taken as whole as it has done in S. 3. *Sham Rao* v. *District Magistrate Thana*, **A I R 1952 S C 324 =1952 S C R 683 =1952 S C J 476.**

Saurashtra State Public Safety Measures (Third Amendment) Ordinance (66 of 1949)

(1387) *S. 11—Validity—Delegated legislation—Constitution of India, Art. 245.*

Per *Mukherjee and Das JJ.* — S. 11 of the Saurashtra Ordinance is not a case of a delegated legislation at all but is an instance of conditional legislation coming within the rule of *Queen* v, *Burah*, 4 Cal 172 P C and is not illegal on that ground.

Per *Patanjali Sastri C. J.*—Legislatures in India have plenary authority to delegate

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their power to make laws to subordinate agencies of their choice and such delegation, however inexpedient or undesirable politically is constitutionally competent : A I R 1951 S C 332, *Ref. Kathi Raning* v. *State of Saurashtra*,

A I R 1952 S C 123
=1952 S C R 435
=1952 S C J 168.

(1388) *Saurashtra State Public Safety Measures (Third Amendment) Ordinance (66 of 1949)—Ordinance is intra vires and constitutional — Constitution of India, Art. 14.*

Per *Patanjali Sastri C. J., Fazl Ali, B. K. Mukherjea and Das JJ.: (Mahajan, Chandrasekhara Aiyar and Vivian Bose, JJ. Contra)*—The Saurashtra State Public Safety Measures (Third Amendment) Ordinance, 1949, is not unconstitutional. Section 11 of the Saurashtra Ordinance in so far as it authorises the State Government to direct offences or classes of offences or classes of cases to be tried by the Special Court does not offend against the equal protection clause of the Constitution of India, and the notification No. 35.5C D/- 9-2-1950 which has been issued by the Saurashtra Government under that part of the section cannot be held to be invalid or ultra vires. A I R 1952 S C 75, *Disting.*

Per *Patanjali Sastri C. J.* — The impugned Ordinance having been passed to combat the increasing tempo of certain types of regional crime, the two-fold classification on the lines of type and territory adopted in the impugned Ordinance, read with the notification issued thereunder, is reasonable and valid, and the degree of disparity of treatment involved is in no way in excess of what the situation demanded.

Per *Fazl Ali J.*—The clear recital of a definite objective furnishes a tangible and rational basis of classification to the State Government for the purpose of applying the provisions of the Ordinance and for choosing only such offences or cases as affect public safety, maintenance of public order and preservation of peace and tranquility. Thus, under S. 11, the State Government is expected to select only such offences or class of offences or class of cases for being tried by the special Court in accordance with the special procedure, as are calculated to affect public safety, maintenance of public order etc., and under S. 9 the use of the special procedure must necessarily be confined to only disturbed areas or those areas where adoption of public safety measures is necessary. This is in plain language the rationale of the Ordinance, and it will be going too far to say that in no case and under no circumstances can a legislature lay down a special procedure for the trial of a particular class of offences, and that recourse to a simplified and less cumbrous procedure for the trial of those offences, even when abnormal conditions prevail, will amount to a violation of Art. 14 of the Constitution.

Per *Das J.*—Section 11 of the Saurashtra Ordinance, like S. 5 (1), West Bengal Special Courts Act, refers to four distinct categories, namely, "offences" "classes of offences," "cases" and "classes of cases" and empowers the State Government to direct any one or more of these categories to be tried by the Special Court constituted under the Act. The expressions "offences," "classes of offences" and "classes of cases" clearly indicate and obviously imply a process of classification of offences or cases. Prima facie those words do not contemplate any particular offender or any particular accused in any particular case. The emphasis is on "offences", "classes of offences" or "classes of cases. "The classification of "offences" by itself is not calculated to touch any individual as such, although it may after the classification is made, affect all individuals who may commit the particular offence. In short the classification implied in this part of the sub-section has no reference to, and is not directed towards the singling out of any particular person as an object of hostile State action but is concerned only with grouping of "offences," "classes of offences" and "classes of cases" for the purpose of the particular legislation as recited in its preamble. Section 11 of the Ordinance properly construed and understood, does not confer an uncontrolled and unguided power on the State Government. On the contrary, this power is controlled by the necessity for making a proper classification which is to be guided by the preamble in the sense that the classification must have a rational relation to the object of the Act as recited in the preamble. It is, therefore, not an arbitrary power. The Legislature has left it to the State Government to classify offences or classes of offences or classes of cases for the purpose of the Ordinance, for the State Government

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is in better position to judge the needs and exigencies of the State and the Court will not lightly interfere with the decision of the State Government. If at any time, however, the State Government classifies offences arbitrarily and not on any reasonable basis having a relation to the object of the Act, its action will be either an abuse of its power if it is purposeful or in excess of its powers even if it is done in good faith and in either case the resulting discrimination will encounter the challenge of the Constitution and the Court will strike down, not the law which is good but the abuse or misuse or the unconstitutional administration of the law creating or resulting in unconstitutional discrimination.

Per *Mahajan J. (Dissenting)* — Section 11 of the Ordinance, like S. 5 (1) of the West Bengal Act (X [10] of 1950) suggests no reasonable basis or classification either in respect of offences or in respect of cases. It has laid down no measure for the grouping either of persons or of cases or of offences by which measure these groups could be distinguished from those outside the purview of the special Act. The State Government can choose a case of a person similarly situate and hand it over to the special tribunal and leave the case of another person in the same circumstances to be tried by the procedure laid down in the Criminal Procedure Code. It can direct that the offence of simple hurt be tried by the special tribunal, while a more serious offence be tried in the ordinary way. Section 11 of the Ordinance offends against Art. 14 of the Constitution and is, therefore, unconstitutional. *Kathi Raning* v. *State of Saurashtra*,

A I R 1952 S C 123
=1952 S C R 435=1952 S C J 168.

PUNJAB LAND REVENUE ACT (17 of 1887)

(1389) *Ss. 31, 44—Jamabandi entries—Authenticity.*

The entries in Jamabandies fall within the purview of the record of rights under S. 31 and are to be presumed to be true under S. 44 until the contrary is proved. *Chhote Khan* v. *Mal Khan*,

A I R 1954 S C 575
=1954 S C J 577

PUNJAB TRADE EMPLOYEES ACT (10 of 1940)

(1390) *As amended in 1943, Ss. 7 (1) & 2A—S. 7 (1) is intra vires—Govt. of India Act (1935), Sch. VII, List II, item 27 & List III, item 27—Constitution of India, Sch. VII, List II, item 26 & List III, items 24 & 33.*

The subject-matter of S. 7 (1), Punjab Trade Employees Act is covered by Sch. VII, List II, item 27 & List III, item 27 & as such is *intra vires.*

The impugned section is a general one & applies to all kinds of shops; that is to say, to those in which labour is employed as well as those which are run by the owners and their families. The Act in which the section occurs is directed at regulating the hours of employment of persons who are employed in the business of shops or commercial establishments. Therefore, in so far as S. 7 covers establishments where labour is employed, it is undoubtedly *intra vires.*

Where a shop is run only by the owner and his son without employment of any labour, the mere fact that cls. (i) & (j) of S. 2A exempts persons employed in managerial capacity & the members of the family of the employer from the purview of the Act cannot give the owner or the son the right to keep the shop open on a close day. Even where the owner of the shop and the manager are the same, the two capacities will have to be separated for purposes of S. 7 (1) under which the owner is obliged to close his shop one day in a week. S. 2A (i) does not control S. 7 (1).

Consequently, where the son sells an article to a customer on a close day the owner would be guilty under S. 16 read with S. 7 (1). *Manohar Lal* v. *The State.*

A I R 1951 S C 315
=1951 S C J 475
=1951 S C R 671.

PUNJAB FINANCIAL RULES

(1391) *Responsibility of head of office for pay drawn on bill signed by him.*

Under the Punjab Financial Rules, the head of an office is personally responsible for every pay drawn on a bill signed by him or on his behalf until he has paid it to the person entitled to receive it and obtained his receipt, duly stamped where necessary on the office copy of the pay bill. This responsibility is a serious one and a disclaimer thereof is not lightly to be accepted. *Bhagat Ram* v. *State of Punjab.*

A I R 1954 S C 621.

RAJASTHAN FOODGRAINS CONTROL ORDER (1949)

(1392) *Cl. 25 — Validity — (Constitution of India, Arts. 19 (1) (g), 31 (2)).*

The freezing of the stocks of foodgrains under Cl. 25 of the Rajasthan Foodgrains Control Order, 1949, is reasonably related to the object, which the Essential Supplies (Temporary Powers) Act, 1946, was intended to achieve, namely to secure the equitable distribution and availability at fair prices and to regulate transport, distribution, disposal and acquisition of an essential commodity such as foodgrains. The first portion of the clause cannot, therefore, be held as void under Art. 19 (1) (g).

The last portion of the clause, however, places an unreasonable restriction upon the carrying on of trade or business and is thus an infringement of the dealers' right under Art 19 (1) (g) of the Constitution and is, therefore, to that extent void.

The same result follows if the impugned clause is examined in the light of Art 31 (2). The clause by vesting the power in the Authority to acquire the stocks at any price fails to fix the amount of the compensation or specify the principles on which the compensation is to be determined. The clause leaves it entirely to the discretion of the executive authority to fix any compensation it likes and thus offends against Art. 31 (2). *State of Rajasthan* v. *Nath Mal.*

A I R 1954 S C 307
=1954 S C J 409.

REGISTRATION ACT (1908)

(1393) *S. 17 (1) (b), (d) and (2) (vi)—Scope—Compromise decree containing contingent agreement for perpetual underlease—Civil P. C. (1908), O. 23, R. 3.*

One *K* granted a permanent lease of right to under-ground coal in a certain area to *S*. Subsequently he granted a permanent patta to *D* in respect of coal to be found in a part of the same area. *S* brought a suit for declaration of title and possession against *D* to which *K* also was added as party defendant. The suit was compromised on the terms that *K* was to be paid a reduced royalty by *S* for the entire area and S was to accept *D* as his tenant in respect of the disputed area and receive an increased rate of royalty from him than *D* agreed to pay *K* under his patta. Further the agreement provided that the whole arrangement would take effect only upon *S* paying *K* a specified sum of money before a certain date. In a

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suit for royalty by the successor-in-interest of *S* due under this decree the defendant, namely, the representatives of *D* contending that the decree could not be given effect to for want of registration:

Held that though the legal effect of the decree was to create a perpetual underlease between *S* and *D*, yet it did not fall under S. 17 (1) (d) as the creation of that relationship was made contingent on *S* paying *K* the specified amount within date; and that the decree although was covered by sub-s. (1) (b) was excepted by sub-s. (2) (vi) from compulsory registration. *Mangan Lal* v. *Md. Moinul Huque*

A I R 1951 S C 11
=1951 S C J 9
1950 S C R 833.

(1394) *S. 17 (1) (b)—Mortgage by deposit of title deeds—Memorandum given along with title deeds — Registration—Transfer of Property Act (1882), Ss. 58 (f) and 59.*

When the debtor deposits with the creditor the title deeds of his property with intent to create a security, the law implies a contract between the parties to create a mortgage. and no registered instrument is required under S. 59 as in other forms of mortgage. But if the parties choose to reduce the contract to writing, the implication is excluded by their express bargain, and the document will be sole evidence of its terms. In such a case, the deposit and the document both form integral part of the transaction and are essential ingredients in the creation of the mortgage. As the deposit alone is not intended to create the charge and the document, which constitutes the bargain regarding the security is also necessary and operates to create the charge in conjunction with the deposit, it requires registration under S. 17, Registration Act, as a non-testamentary instrument creating an interest in immovable property, where the value of such property is one hundred rupees and upwards. The time factor is not decisive. The document may be handed over to the creditor along with the title deeds and yet not be registrable, or it may be delivered at a later date and nevertheless be registrable.

On account relating to the appellant's dealings being examined a large sum was found due to the respondents who demanded payment. The appellant thereupon brought

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and gave certain title deeds relating to immovable properties belonging to his family, for the purpose of being held as security for the amounts then due and to become due on further dealings. A draft of the memorandum was thereafter prepared and signed and delivered to the respondents. The memorandum was in the following terms: "We write to put on record that to secure the repayment of the money already due to you from us on account of the business transactions between yourselves and ourselves and the money that may hereafter become due on account of such transactions we have this day deposited with you the following title deeds in Calcutta at your place of business at No. 7, Sambhu Mullick Lane, relating to our properties at Samastipur with intent to create an equitable mortgage on the said properties to secure all moneys including interest that may be found due and payable by us to you on account of the said transactions . . . ."

Held that the memorandum did not require registration. *Rachpal* v. *Bhagwandas.* **A I R 1950 S C 272 =1950 S C J 361 =1950 S C R 741.**

(1395) *S. 17 (1) (b)—"Limit or extinguish"—Mortgage—Agreement to release—Evidence Act (1872), S. 92, Proviso 4.*

There is a difference between a receipt and a remission or a release. A receipt is not the payment, nor does the document in such a case serve to extinguish the mortgage or limit the liability. It is the payment of the money which does that and the receipt does no more than evidence the fact. Not so a release. The extinguishment or diminution of liability is in that event effected by the agreement itself and not by something external to it. If the agreement is oral, it is hit by proviso 4 to S. 92, Evidence Act, for it "rescinds" or "modifies" the contract of mortgage. If it is in writing, it is hit by S. 17 (1) (b), Registration Act, for in that case the writing itself "limits" or extinguishes" the liability under the mortgage. *Kashinath Bhaskar* v. *Bhaskar Vishweshwar.* **A I R 1952 S C 153 =1952 S C R 491 =1952 S C J 150.**

(1396) *S. 17 (1) (b)—Mortgage—Variation of interest payable under mortgage.*

One part of 'interest' which a mortgagee has in mortgaged property is the right to

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receive interest at a certain rate when the document provides for interest. If that rate is varied, whether to his advantage or otherwise, then his 'interest' in the property is affected. If the subsequent agreement substitutes a higher rate, then to the extent of the difference it 'creates' a fresh 'interest' which was not there before. If the rate is lowered, then his original 'interest' is limited. A I R 1938 Rang. 285, *Approved. Kashinath Bhaskar* v. *Bhaskar Vishweshwar,* **A I R 1952 S C 153 =1952 S C R 491=1952 S C J 150.**

(1397) S. 17 (2) (vi) (as amended by T. P. (Amendment) Supplementary Act, 1929)—Applicability — Compromise decree before amendment — Amended clause does not apply—Decree is not compulsorily registrable even if immovable property other than subject-matter of suit is comprised therein—Civil P. C. (1908), O. 23, R. 3. *Mangan Lal* v. *Md. Moinul Huque,* **AIR 1951 S C 11=1951 S C J 9 =1950 S C R 833.**

(1398) *S. 17 (2) (v) — Document itself creating interest in immovable property.*

If the document itself creates an interest in immoveable property, the fact that it contemplates the execution of another document will not exempt it from registration under S. 17 (2) (v). *Kashinath Bhaskar* v. *Bhaskar Vishweshwar,* **AIR 1952 S C 153=1952 S C R 491 =1952 S C J 150.**

(1399) *Ss. 32 and 33—Scope.*

Where, a document is presented for registration by a person other than a party to it or his legal representative or assign or by a person who is not an agent authorized in the manner prescribed in S. 33, such presentation is wholly inoperative, and the registration of such a ducument is void. AIR 1914 P C 16. *Rel. on. Kishore Chandra* v. *Ganesh Prasad,* **AIR 1954 S C 316.**

(1400) *Ss. 32 and 33—Applicability — (Bihar and Orissa Registration Manual, R. 157).*

Section 32 would apply only if a power of attorney is presented for a registration, and not when it is produced merely for authentication, in which case, the only requirments, that have to be complied with are those set out in S. 33. Moreover, R. 157 of the Bihar and Orissa Registration Manual provides that any person can present a document for authentication.

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Where a power of attorney executed by the principal is presented for registration by a person not duly authorized under S. 32 but the power of attorney is subsequently authenticated at the residence of the executant in his presence in accordance with S. 33, the subsequent authentication which is an independent act complete in itself must be held to be valid under S. 33. The previous invalid presentation for registration cannot detract from the validity of the subsequent authentication. A I R 1921 P C 93, *Rel. on. Kishore Chandra* v. *Ganesh Prasad*, **AIR 1954 S C 316.**

(1401) *S. 33 (1) Proviso—Scope.*

Where the Registrar authenticates a power of attorney under S. 33 at the residence of the executant, it must be presumed that he did so on an application setting out the proper ground, and that he satisfied himself that that ground did exist. Whether he was right in his conclusion that the executant was suffering from bodily infirmity is not a matter which can be gone into a Court of law. A decision of the Registrar that an applicant was suffering from bodily infirmity for the purposes of S. 33 (1), proviso cl. (1), relates to a mere matter of procedure not affecting his jurisdiction, and even if erroneous, would not affect the validity of the registration. A I R 1929 P C 279, *Ref. to, Kishore Chandra* v. *Ganesh Prasad*,

A I R 1954 S C 316.

(1402) *S. 33 (1) (a) — Resides — Temporary residence.*

Even temporary residence at a place is sufficient to clothe the Registrar of that place with jurisdiction under S. 33 (1) (a). A I R 1937 P C 46, *Rel. on.*

The fact that the house where the power of attorney was registered did not belong to the executant is not material for this purpose; because residence only connotes that a person eats, drinks and sleeps at that place, and not that he owns it. Whether the stay of the executant was of a casual nature, or whether it amounted to residence must depend on all the circumstances proved and is essentially a question of fact. *Kishore Chandra* v. *Ganesh Prasad*,

A I R 1954 S C 316.

(1403) *S. 49—Transfer of Property Act (1882), S. 53-A — Unregistered agreement of lease—Admissibility in evidence.*

An agreement of lease creating a present demise but not registered is admissible under S. 49, Registration Act as evidence of part performance. *Manek Lal* v. *H. J. Ginwalla & Sons*, **A I R 1950 S C 1 =1950 S C R 75=1950 S C J 37.**

RELIGIOUS ENDOWMENT

(1404) *Dedication — Nature of — How determined — Right of residence given to shebaits—Effect.*

A dedication may be either absolute or partial. The property may be given out and out to the idol, or it may be subjected to a charge in favour of the idol. The question whether the idol itself shall be considered the true beneficiary, subject to a charge in favour of the heirs or specified relatives of the testator for their upkeep, or that on the other hand, these heirs shall be considered the true beneficiaries of the property, subject to a charge for the upkeep, worship and expenses of the idol, is a question which can only be settled by a conspectus of the entire provisions of the will. A I R 1921 P C 20, *Rel. on.*

Thus where by a will certain premises were expressly declared as absolutely dedicated to a deity as its permanent habitation with only the right given to the Sevayats to reside in the said premises for the purposes of carrying on the daily and periodical seva and the festivals, etc., of the deity, the premises were to be registered in the Municipal records in the name of the deity, the Municipal bills were to be taken also in its name and none of the testator's representatives, heirs, successors, executors, administrators or assigns were to have any manner of interest in or right to the said premises or were to be competent to give away or effect sale, mortgage, etc., of the said premises;

Held, that there a clear indication of the intention of the testator to absolutely dedicate the said premises to the deity.

(2) that the right given to the sevayats did not detract from the absolute character of the dedication. 24 Cal W N 1026 (P C), *Rel. on. Shree Shree Ishwar Sridhar Jew* v. *Sushila Bala*, **A I R 1954 S C 69 =1954 S C J 17.**

(1405) *Shebaits — Adverse possession— (Adverse possession) — (Limitation Act (1908), Art. 144).*

If a shebait by acting contrary to the terms of his appointment or in breach of his duty as such shebait could claim adverse

possession of the dedicated property against the idol it would be putting a premium on dishonesty and breach of duty on his part and no property which is dedicated to an idol would ever be safe. The shebait for the time being is the only person competent to safeguard the interests of the idol, his possession of the dedicated property is the possession of the idol whose sebait he is, and no dealing of his with the property dedicated to the idol could afford the basis of a claim by him for adverse possession against the idol. A I R 1933 Cal 295, *Approved.* *Shree Ishwar Sridhar* v. *Sushila Bala*,

A I R 1954 S C 69=1954 S C J 17.

REPRESENTATION OF THE PEOPLE ACT (43 of 1951)

(1406) *S. 2 (1) (k)—Signature of illiterate person — Authentication.*

The definition of "sign" indicates that in the case of illiterate persons it is necessary to guard against misrepresentation and fraud by requiring that their signatures should be formally authenticated in a particular way. *Rattan Anmol Singh* v. *Ch. Atma Ram*,

A I R 1954 S C 510.

(1407) *S. 7 (d)—Enforceability of contract against Government.*

Section 7 (d) does not require that the contracts at which it strikes should be enforceable against the Government; all it requires is that the contracts should be for the supply of goods to the Government.

The purpose of the Act is to maintain the purity of the legislatures and to avoid a conflict between duty and interest. It is obvious that the temptation to place interest before duty is just as great when there is likely to be some difficulty in recovering the money from Government as when there is none. *Chatturbhaj Vithaldas* v. *Moreshwar Parasharam*, **A I R 1954 S C 236 =1954 S C R 817.**

(1408) *S. 7 (d) — Contract for supply of goods — Continuation of.*

A contract for the supply of goods does not terminate when the goods are supplied; it continues in being till it is fully discharged by performance on both sides. It cannot be said that the moment a contract is fully executed on one side and all that remains is to receive payment from the other, then the contract terminates and a new relationship of debtor and creditor takes its place. There is always a possibility of the liability being disputed before actual payment is made and the vendor may have to bring an action to establish his claim to payment. The existence of the debt depends on the contract and cannot be established without showing that payment was a term of the contract. It is true the contractor might abandon the contract and sue on 'quantum meruit' but if the other side contested and relied on the terms of the contract, the decision would have to rest on that basis: (1905) 2 Ir R 590; AIR 1931 Cal 288, *Rel. on. Chatturbhaj Vithaldas* v. *Moreshwar Parasharam*, **A I R 1954 S C 236 =1954 S C R 817.**

(1409) *S. 7 (d) — Stage of choice.*

The words of the section are "shall be disqualified for being chosen." The choice is made by a series of steps starting with the nomination and ending with the announcement of the election. It follows that if a disqualification attaches to a candidate at any one of these stages he cannot be chosen. *Chatturbhaj Vithaldas* v. *Moreshwar Parasharam*, **A I R 1954 S C 236 =1954 S C R 817.**

(1410) *S. 7 (d) — Contract for supply of goods.*

A contract to replace goods is still one for the supply of the goods which are sent as replacements. *Chatturbhaj Vithaldas* v. *Moreshwar Parasharam*, **A I R 1954 S C 236 =1954 S C R 817.**

(1411) *S. 7 (d) — Share or interest in a contract.*

Certain firm having contract for supply of goods with Government—Partner in the firm must also be held to have both a share and an interest in the contract. *Chatturbhaj Vithaldas* v. *Moreshwar Parasharam*, **A I R 1954 S C 236 =1954 S C R 817.**

(1412) *S. 33 — "Subscribe" includes element of signing — Signature to be in authorised manner — (Representation of the People (Conduct of Elections and Election Petitions) Rules, 1951, R. 2 (2)).*

Whether "subscribe" is a synonym for "sign" or whether it means "sign" plus something else, namely a particular assent, the element of "signing" has to be present: the prescribed nomination form referred to in S. 33 (1) is to be found in Sch. II of the Election Rules, 1951 which

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places that beyond doubt because it requires certain "signatures." Hence, the "signing," whenever a "signature" is necessary, must be in strict accordance with the requirements of the Act and where the signature cannot be written it must be authorised in the manner prescribed by R. 2 (2) of the Representation of the People (Conduct of Elections and Election Petitions) Rules, 1951. According to that rule attestation in the prescribed manner is required in the case of proposers and seconders who are not able to write their names. *Rattan Anmal Singh* v. *Ch. Atma Ram*, **A I R 1954 S C 510.**

(1413) *Ss. 33 (2), 79 (b) and S. 123 (8) —Nomination proposed or seconded by Government servant — Effect.*

An election of a member to a State Legislative Assembly is not invalidated merely because the member's nomination was either proposed or seconded, or both, by a Government servant or servants. Section 33 (2) is general and confers the privilege of proposing or seconding a candidate for election on every person who is registered in the electoral roll provided he is not disqualified under S. 16 of the Act of 1950. That section excludes three classes of persons but not Government servants, unless of course they happen to fall within those classes. Therefore, so far as S. 33 (2) is concerned, a Government servant is entitled to nominate or second a candidate for election unless he happens to fall in one of the three excluded categories.

Section 123 (8) does not take away from the Government servants the right expressly given to them under S. 33 (2). The policy of the law is to keep Government servants aloof from politics and also to protect them from being imposed on by those with influence or in positions of authority and power, and to prevent the machinery of Government from being used in furtherance of a candidate's return. But at the same time it is not the policy of the law to disenfranchise them or to denude them altogether of their rights as ordinary citizens of the land.

But, if the procurement of Government servants to propose and second a nomination is part of a plan to procure their assistance for the furtherance of the candidate's prospects in other ways than by vote, then S. 123 (8) is attracted, for in that case, the

plan, and its fulfilment must be viewed as a connected whole and the acts of proposing or seconding which are innocent in themselves cannot be separated from the rest.

Per *Mehr Chand Mahajan C. J., B. K. Mukherjea, S. R. Das and Ghulam Hasan JJ. (Bose J. dubitante)* : — In order to bring a case within the mischief of S. 123 (8) the assistance must be for the furtherance of the prospects of the Candidate's election. Unless a case falls within the latter half of the definition of a "candidate" in S. 79 (b) a person becomes a candidate under the first part of the definition only when he has been duly nominated as a 'candidate' and the furtherance of the prospects of a candidate's election must, therefore, in such a case commence from after that stage. Hence, the proposing and seconding by a Government servant cannot be regarded as "assistance for the furtherance of the prospects of the candidate's election" unless there is a finding bringing the case under the second part of the definition in S. 79(b). *Raj Krushna* v. *Binod*,

A I R 1954 S C 202
=1954 S C R 913
=1954 S C J 286.

(1414) *Ss. 33 (2) and 123 (8)—Candidate proposed or seconded by the Government servant.*

Section 33 (2) confers the privilege of proposing or seconding a candidate on any person who is registered in the electoral roll; S. 123 (8) cannot be construed as taking away that privilege. Hence subscribing of a nomination paper by a Government servant as proposer or seconder is not illegal. A I R 1954 S C 202, *Foll. Satya Dev* v. *Padam Dev*,

A I R 1954 S C 587
=1954 S C J 764.

(1415) *Ss. 36 and 100 (1) (c) and (2) (c)—Scope and applicability—'Improper acceptance' and 'non-compliance with the provisions of the Constitution,' meaning of.*

If the want of qualification of a candidate does not appear on the face of the nomination paper or of the electoral roll, but is a matter which could be established only by evidence, an enquiry at the stage of scrutiny of the nomination papers is required under the Act only if there is any objection to the nomination. The Returning Officer is then bound to make such enquiry as he thinks proper on the result of which he can either

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accept or reject the nomination. But when the candidate appears to be properly qualified on the face of the electoral roll and the nomination paper and no objection is raised to the nomination, the Returning Officer has no other alternative but to accept the nomination. This would be apparent from section 36 sub-section (7) of the Act, under which the electoral roll is conclusive as to the qualification of the elector except where a disqualification is expressly alleged or proved. The acceptance of the nomination paper by the Returning Officer in the latter case must be deemed to be proper acceptance. It is certainly not final and the Election Tribunal may, on evidence placed before it, come to a finding that the candidate was not qualified at all. But the election should be held to be void on the ground of the constitutional disqualification of the candidate and not on the ground that his nomination was improperly accepted by the Returning Officer. A case of this description comes under sub-section (2) (c) of S. 100 and not under sub-section (1) (c) of the section as it really amounts to holding an election without complying with the provisions of the Constitution.

The expression "non compliance with the provisions of the Constitution" in S. 100 (2) (c) is sufficiently wide to cover such cases where the question is not one of improper acceptance or rejection of the nomination by the Returning Officer, but there is a fundamental disability in the candidate to stand for election at all.

When a person is incapable of being chosen as a member of a State Assembly under the provisions of the Constitution itself but has nevertheless been returned as such at an election, it can be said without impropriety that there has been non-compliance with the provisions of the Constitution materially affecting the result of the election. There is no material difference between "non-compliance" and "non-observance" or "breach" and this item in clause (c) of sub-section (2) may be taken as a residuary provision contemplating cases where there has been infraction of the provisions of the Constitution or of the Act but which have not been specifically enumerated in the other portions of the clause. *Durga Shankar Mehta* v. *Raghuraj Singh.*

A I R 1954 S C 520 =1954 S C J 723.

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(1416) *S. 36 (2) (d) — Nomination papers not properly subscribed—Rejection.*

Where the nomination papers are not "signed" either in one way or the other as contemplated by S. 33, they have not been "subscribed" because "subscribing" imports a "signature" and as the Act sets out the only kinds of "signatures" which it will recognise as "signing" for the purposes of the Act, there are no valid signatures of either a proposer or a seconder in the nomination papers. The Returning Officer is, therefore, bound to reject them under S. 36 (2) (d) of the Act because there is a failure to comply with S. 33, unless he can have resort to S. 36 (4). *Rattan Anmol Singh* v. *Ch. Atma Ram,*

A I R 1954 S C 510.

(1417) *S. 36(2) (d)—Nomination paper defective under S. 33 — Defect cannot be cured at scrutiny stage.*

The attestation and the satisfaction contemplated by S. 2 (1) (k) read with Rule 2 (2) of Election Rules, 1951 must exist at the presentation stage. A total omission of such an essential feature cannot be subsequently validated any more than the omission of a candidate to sign at all could have been. The only jurisdiction the Returning Officer has at the scrutiny stage is to see whether the nominations are in order and to hear and decide objections. He cannot at that stage remedy essential defects or permit them to be remedied. It is true he is not to reject any nomination paper on the ground of any technical defect which is not of a substantial character but he cannot remedy the defect. He must leave it as it is. If it is technical and unsubstantial it will not matter. If it is not, it cannot be set right. *Rattan Anmol Singh* v. *Ch. Atma Ram,* **A I R 1954 S C 510.**

(1418) *S. 36 (4) — Nomination paper subscribed by illiterate person—Absence of attestation — Effect.*

Attestation to the mark placed by an illiterate person on nomination papers is as necessary and as substantial as attestation in the cases of a will or a mortgage and is on the same footing as the "subscribing" required in the case of the candidate himself. If there is no signature and no mark the forms would have to be rejected and their absence could not be dismissed as technical and unsubstantial. The "satisfaction" of

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the Returning Officer which Rule 2 (2) of the Rules, 1951 requires is not any the less important and imperative. Thus, the question of attestation in such cases is not mere technical or unsubstantial requirement. *Rattan Anmol Singh* v. *Ch. Atma Ram*,

A I R 1954 S C 510.

(1419) *S. 81—Prescribed period of limitation — Computation — (Constitution of India, Art. 226).*

The notice of expenses of a returned candidate was published in the Gazette on 31.3.1952. An election petition was sent by registered post on 11-4-1952 and it reached the Commission on 14-4-1952. By an application for a writ of certiorari against the decision of the tribunal it was contended that the Tribunal had acted without jurisdiction in condoning the delay and entertaining the petition which reached it after the 14 days prescribed under R. 119 of the Election Rules framed under the Act.

Held even assuming the proposition that the Tribunal had no power to condone the delay was correct no question arose in the case of the tribunal having entertained the application after the prescribed period. The date of publication of the return of accounts was not to be included in computing the period of 14 days and therefore the petition which should be deemed to have been presented on 14-4-1952 was presented within and not later than 14 days from the date of publication of the return of accounts. *T. C. Basappa* v. *T. Nagappa*,

A I R 1954 S C 440
=1954 S C J 695.

(1420) *Ss. 81, 82, 83, 85, 90, 98 and 117 — Scope.*

Both the Election Commission and the Tribunal have been given powers in express terms to dismiss an election petition which does not comply with the requirements of S. 81, 83 or 117, but no such powers are given to dismiss a petition 'in limine' which does not comply with the provisions of S. 82. Such a petition can only be dismissed at the conclusion of the trial and on grounds sufficient to dismiss it (S. 98). Specific provisions have been made to ensure that allegations of corrupt practice etc., are not lightly or frivolously made by providing that the petition must be properly verified and the allegations contained therein stated with a certain amount of definiteness and accuracy and it is an express

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provision of Part VI itself that the procedure of the tribunal is to be governed by the Code of Civil Procedure and where a petition complies with S. 81, 83 or 117, the Commission is bound to refer the petition to an election tribunal and the tribunal, unless it is of the opinion that the petition is not in accordance with S. 81, 83 or 117, is bound to try it and decide it according to the provisions of law.

It is no valid explanation to say that S. 82 was omitted from the provisions of S. 85 simply on the ground that the Election Commission was absolved from the duty of making elaborate inquiries at the stage when it had to say whether the provisions of Ss. 81, 83 and 117 had been complied with. From the circumstance that S. 82 does not find a place in the provisions of S. 85 the conclusion follows that the directions contained in S. 82 were not considered to be of such a character as to involve the dismissal of a petition in limine and that the matter was such as could be dealt with by the Tribunal under the provisions of the Code of Civil Procedure specifically made applicable to the trial of election petitions.

It is not possible to accept the view that in spite of the provisions of S. 85 failure to comply strictly with the provisions of S. 82 has the same consequences as are contained in S. 85. The determination of the question whether the parties to the petition have been properly impleaded is a matter not for the Election Commission but for the Tribunal. *Jagan Nath* v. *Jaswant Singh*,

A I R 1954 S C 210=1954 S C R 842
=1954 S C J 257.

(1421) *Ss. 82, 90, 110, 115, 116 and Part VI —Non-joinder of parties, to election petition—Effect—(Civil P. C. (1908), O. 1 Rr. 9, 10 and 13).*

Non-compliance with the provisions of the law relating to the impleading of parties, viz., S. 82, is not necessarily fatal and can be cured. It is for the Tribunal to determine the matter as and when it arises in accordance with the provisions of the Code of Civil Procedure which have been made expressly applicable.

Section 90 (1) indicates that the array of parties as provided by S. 82 is not final and conclusive and that defects can be cured. Provisions of Ss. 110, 115 and 116 of Chap-

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ter IV of Part VI also support this view. These provisions suggest that if any proper party is omitted from the lists of respondents, such a defect is not fatal and the tribunal is entitled to deal with it under the provisions of the Code of Civil Procedure, Order I, Rules 9, 10 and 13.

Held, in the circumstances of the case that the non-joinder of a duly nominated candidate who had withdrawn his candidature and had not contested the election, as a respondent to the election petition, was not fatal to the petition as no prejudice was likely to result to the petitioner because the main ground on which the petition was based was that the petitioner's nomination paper had been wrongly rejected. The defect could be subsequently cured by the Tribunal *Jagan Nath* v. *Jaswant Singh*,

A I R 1954 S C 210=1954 S C J 257 =1954 S C R 842.

(1422) *S. 83 (3) — Amendment of election petition—(Constitution of India, Art. 226).*

Where the only amendment applied for by the petitioner was a modification in the prayer clause by insertion of an alternative prayer to the original prayer in the petition and no change whatsoever was sought to be introduced in the actual averments in the petition and the original prayer which was kept intact was repeated in the application for amendment and the alternative prayer introduced by the amendment was not eventually allowed by the Tribunal which granted the prayer of the petitioner as it originally stood.

Held, that in these circumstances the mere fact that the Tribunal granted the petitioner's application under O. 6 R. 17, Civil P. C. became altogether immaterial and had no actual bearing on the decision in the case. Therefore, even if the conclusion that the Election Tribunal which was a special court endowed with special jurisdiction had no general power of allowing amendment of the pleadings, and that the express provision of section 83 (3) of the Act, which empowered the Tribunal to allow amendments with respect to certain specified matters, impliedly excluded the power of allowing general amendment as is contemplated by order 6 Rule 17 of the Civil Procedure Code, was correct it could not be held that the tribunal had acted without

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jurisdiction in the case so as to warrant the issue of a writ of certiorari. *T. C. Basappa* v. *T. Nagappa*, **A I R 1954 SC 440 =1954 S C J 695.**

(1423) *S. 85, Proviso—Abuse of power.*

The proviso to S. 85 advisedly confers on the Election Commission wide discretion in the matter, and the obvious intention of the legislature was that it should be exercised with a view to do justice to all the parties. The Election Commission might therefore be trusted to pass the appropriate order when there is avoidable and unreasonable delay. That a power might be liable to be abused is no ground for denying it, when the statute confers it, and where there is an abuse of power by statutory bodies, the parties aggrieved are not without ample remedies under the law. *Dinabandhu* v. *Jadumoni Mangaraj*, **A I R 1954 S C 411 =1954 S C J 605.**

(1424) *S. 85, Proviso — Exercise of discretion —(Limitation Act (1908), S. 5 —Sufficient cause).*

The petition under S. 81 had been presented at the post office one day earlier, and reached the Election Commission one day later than the due date:

Held, that even if the matter had to be judged under S. 5 of the Limitation Act, it would have been a proper exercise of the power under that section to have excused the delay. The words "sufficient cause" should receive a liberal construction so as to advance substantial justice when no negligence nor inaction nor want of bona fides is imputable to the appellant. The order condoning delay was on the facts a proper one to pass under the proviso to S. 85. 13 Mad. 269, *Approved*. *Dinabandhu* v. *Jadumoni Mangaraj*,

A I R 1954 S C 411 =1954 S C J 605.

(1425) *S. 85, Proviso — Satisfaction of Election Commission.*

While the proviso to S. 85 requires that "the person making the petition" should satisfy the Election Commission that there was sufficient cause for delay, it does not require that he should do so in person. And there is nothing in the character of the proceeding requiring that the petitioner should make the representations under that proviso in person. It is only a question of satisfying the Election Commission that there was sufficient ground for excusing the delay, and that

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A I R 1954 S C 411
=1954 S C J 605.

(1426) *Ss. 85 Proviso and 90 (4)—Condoning delay — (Limitation Act (1908), S. 5— Finality of order under).*

The rights under litigation in these proceedings are not common law rights but rights which owe their existence to statutes, and the extent of those rights must be determined by reference to the statutes which create them. The proviso to section 85 does not contemplate the Election Commission giving to the respondent notice of the petition for condonation of the delay, or the holding of an enquiry as to the sufficiency of the grounds in his presence before passing an order under it.

The policy underlying the provision is to treat the question of delay as one between the Election Commission and the petitioner and to make the decision of the Election Commission on the question final and not open to question at any later stage of the proceedings. Under section 90 (4) of the Act, when the petition does not comply with the requirements of section 81, section 83 or section 117, the Election Tribunal has a discretion either to dismiss it or not, "notwithstanding anything contained in section 85". The scope of the power conferred on the Election Tribunal under section 90 (4) is that it overrides the power conferred on the Election Commission under section 85 to dismiss the petition.

It does not extend further and include a power in the Election Tribunal to review any order passed by the Election Commission under section 85 of the Act. The words of section 90 (4) are, it should be marked, "notwithstanding anything contained in section 85" and not "notwithstanding anything contained in section 85 or any order passed thereunder". An order of the Election Commission under section 85 dismissing a petition as barred will, under the scheme of the Act, be final, and,the same result must follow under section 90 (4) when the order is one excusing the delay.

Section 90 (4) will be attracted only when the Election Commission passes the petition on to the Tribunal without passing any order under section 85. If the Election Commission can thus pass a final order condoning delay without notice to the respondent, there is no reason why it should not pass such an order 'suo motu'. In this respect, the position under the proviso to sec. 85 is materially different from that under section 5 of the Limitation Act, under which an order excusing delay is not final, and is liable to be questioned by the respondent at a later stage. A I R 1954 S C 210 and A I R 1917 P C 179, Rel. on. *Dinabandhu Sahu* v. *Jadumoni Mangaraj*,

A I R 1954 S C 411
=1954 S C J 605.

(1427) *S. 99 (4)—Defective verification —(Constitution of India, Art. 136—Order of Election Tribunal refusing to dismiss petition for defective verification).*

When the Election Commission did not, in fact, dismiss the petition under S. 85 for not complying with S. 83 and passed an order under S. 86 appointing an Election Tribunal for the hearing of the petition, the matter is thereafter governed by S. 90 (4) and it is a matter of discretion with the Election Tribunal either to dismiss the petition for defective verification or not. Where the Election Tribunal directed the verification to be amended and further declined to dismiss the petition under S. 90 (4) for defective verification, these are not orders with which the Supreme Court will interfere in appeal under Art. 136 of the Constitution. *Dinabandhu* v. *Jadumoni Mangaraj*,

A I R 1954 S C 411
=1954 S C J 605.

(1428) *Ss. 86, 90 (4)—Powers of Election Tribunal.*

The jurisdiction to pass an order under S. 86 arises "if the petition is not dismissed under S. 85." That has reference to the factual position whether the petition was, in fact, dismissed under S. 85 and not to the legal position whether it was liable to be dismissed. That is the plain meaning of the words of the section, and that is made plainer by S. 90 (4). This provision clearly contemplates that petitions which are liable to be dismissed for non-compliance with S. 81, 83 or 117 might not have been so dismissed, and provides that when such petitions come before the Election Tribunal, it is a matter of discretion with it to dismiss them or not. The power of the Election Tribunal to condone delay in presentation or defective verification is thus unaffected by the consi

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deration whether that petition was liable to be dismissed by the Election Commission under S. 85. The effect of an order under S. 90 (4) declining to dismiss the petition on the ground of delay or defective verification is clearly to condone those defects. *Dinabandhu* v. *Jadumoni Mangaraj*,

A I R 1954 S C 411
=1954 S C J 605.

(1429) *S. 97 — Grounds that can be urged in recrimination.*

Under S. 97 all matters which can be put forward as grounds for setting aside the election of a candidate if he had been returned under R. 48 of the Election Rules can be urged in answer to the prayer in his election petition that he might be declared duly elected. And the result of this is that the returned candidate can show that if the candidate had been returned under R. 48 his election would have been liable to be set aside for breach of R. 23, and that therefore he should not be declared elected. *Hari Vishnu* v. *Ahmad Ishaque*,

A I R 1955 S C 233.

(1430) *Ss. 98 and 99—Duty of Election Tribunal.*

It is essential that Election Tribunals should do their work in full. They are *ad hoc* bodies to which remands cannot easily be made as in ordinary Courts of law. Their duty does not end by declaring an election to be void or not. Where a number of allegations are made in the petition about corruption and illegal practices, undue influence and bribery it is the duty of the Tribunal not only to enquire into those allegations, but also to complete the enquiry by recording findings about those allegations and either condemn or clear the candidate of the charges made. *Raj Krushna* v. *Binod*,

A I R 1954 S C 202
=1954 S C R 913=1954 S C J 286.

(1431) *S. 100 (1) (c) — "The result of the election has been materially affected" — Meaning—Burden of proof—(Evidence Act (1872), Ss. 101 to 103).*

The words "the result of the election has been materially affected" indicate that the result should not be judged by the mere increase or decrease in the total number of votes secured by the returned candidate but by proof of the fact that the wasted votes would have been distributed in such a manner between the contesting candidates as

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would have brought about the defeat of the returned candidate.

It cannot be held that the mere fact that the wasted votes are greater than the margin of votes between the returned candidate and the candidate securing the next highest number of votes must lead to the necessary inference that the result of the election has been materially affected. That is a matter which has to be proved and the onus of proving it lies upon the petitioner. Should the petitioner fail to adduce satisfactory evidence to enable the Court to find in his favour on this point the inevitable result would be that the Tribunal would not interfere in his favour and would allow the election to stand. *Vashisht Narain* v. *Dev Chandra*,

A I R 1954 S C 513
=1954 S C J 17.

(1432) *S. 100 (1) (c) — "The result of the election has been materially affected" — Speculative finding—Interference with, by Supreme Court—(Constitution of India, Art. 136).*

The language of S. 100 (1) (c) is too clearly for any speculation about possibilities. The section clearly lays down that improper acceptance is not to be regarded as fatal to the election unless the Tribunal is of opinion that the result has been materially affected. Where the finding of the Tribunal that the result of the election has been materially affected is speculative and conjectural, the Supreme Court will interfere with the finding in special appeal. *Vashisth Narain* v. *Dev Chandra*,

A I R 1954 S C 513
=1954 S C J 17.

(1433) *S. 100 (2) (c) — Two conditions for setting aside election — Burden of proof.*

Section 100 (2) (c) requires that before an order setting aside an election can be made, two conditions must be satisfied: It must firstly be shown that there had been improper reception or refusal of a vote or reception of any vote which is void, or non-compliance with the provisions of the Constitution or of the Representation of the People Act, 1951 or any rules or orders made under that Act or of any other Act or rules relating to the election or any mistake in the use of the prescribed form. It must further be shown that as a consequence thereof the result of the election had been materially affected. The two conditions are

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cumulative, and must both be established. The burden of establishing them is on the person who seeks to have the election set aside : A I R 1954 S C 513, *Ref. Hari Vishnu* v. *Ahmad Ishaque*,

A I R 1955 S C 233.

(1434) *S. 100 (2) (a)*—Election of candidate found procured by a minor corrupt practice and illegal practice — Case falls under first two alternatives envisaged by cl. (a) of S. 100 (2)—It is not necessary to enquire whether it also falls under the third alternative, i.e., whether the election has been materially affected — (Election held rightly declared to be void). *Jumna Parsad* v. *Lachhi Ram*,

A I R 1954 S C 686 =1954 S C J 835.

(1435) *S. 100 (2) (b)—Candidate guilty of corrupt practice—His election is void.*

The result of committing any corrupt practice is that the election of the candidate is void under S. 100 (2) (b). It is not necessary to prove that the result of the election was materially affected thereby because cl. (b) of S. 100 (2) is an alternative that stands by itself. All that need be proved is that a corrupt practice has been committed. *Jumna Parsad* v. *Lachhi Ram*,

A I R 1954 S C 686 =1954 S C J 835.

(1436) *S. 100 (2) (c) — "Result of the election" — Result to be on basis of valid votes.*

The rule contemplated by S. 46 is R. 48. That provides that the Returning Officer should after counting the votes "forthwith declare the candidate or candidates to whom the largest number of valid votes has been given to be elected". Under this rule, no candidate can be declared elected on the strength of votes which are liable to be rejected under R. 47. The expression "the result of the election" in S. 100 (2) (c) must, unless there is something in the context compelling a different interpretation, be construed in the same sense as in S. 66, and there it clearly means the result on the basis of the valid votes. *Hari Vishnu* v. *Ahmad Ishaque*,

A I R 1955 S C 233.

(1437) *S. 101 (b)—Applicability.*

Before the Tribunal acting under S. 101 (b) declares a person to be duly elected, it must be proved that 'but for the votes obtained by the returned candidate by corrupt or illegal practices . . . such other candidate would have obtained a majority of the valid votes'. Tribunal should not enter into speculation. (Conclusions of Tribunal in this respect was not a conclusion which any reasonable mind could judicially reach on the data. This part of the order of the Tribunal was set aside). *Jumna Prasad* v. *Lachhi Ram*,

A I R 1954 S C 686 = 1954 S C J 835.

(1438) *S. 123 (8) — Appointment of Government servant as polling agent.*

To hold that Government servants are, as such and as a class, disqualified to act as polling agents would be to engraft an exception to the statute, which is not there. The appointment of a Government servant as polling agent does not, without more, contravene S. 123 (8). If however it is made out that the candidate or his agent had abused the right to appoint a Government servent as polling agent by exploiting the situation for furthering his election prospects, then the matter can be dealt with as an infringement of S. 123 (8). *Satya Dev* v. *Padam Dev*,

A I R 1955 S C 5.

(1439) *S. 123 — Corrupt Practices — (Constitution of India, Art. 136 — Interference with findings of fact).*

The Election Tribunal held that three of the corrupt practices set out in the petition had been established against the appellant. They were (1) that the appellant had, in violation of S. 123 (1), induced the third respondent to with-draw from the election on a promise to get him employment; (2) that he had, in breach of S. 123 (6), used a Bus for conveying the electors to polling and (3) that he had, in contravention of S. 123 (8), obtained the assistance of Extra Departmental Agents in branch post offices and of Presidents of Choukidari Union in canvassing for him in the election, they being in the view of the Election Tribunal, Government servants as defined in that provision. On these findings, the Election Tribunal passed an order setting aside the election of the appellant;

Held that any one of these findings, if accepted, would be sufficient to support the order of the Election Tribunal. With reference to the last of the findings, it was possible to urge with some force that Extra Departmental Agents and Presidents of Chaukidari Union were not, having regard

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to their functions, Government servants, and that accordingly there was no contravention of S. 123 (8).

But the other two findings were pure questions of fact, depending on appreciation of evidence. The Supreme Court does not, when hearing appeals under Art. 136 sit as a Court of further appeal on facts, and does not interfere with findings given on a consideration of the evidence unless they are perverse or based on no evidence. This is particularly so, when the findings under challenge are those of Election Tribunals. The findings in this case that the appellant got the third respondent to with-draw on a promise to get him employment, and had used a certain Bus for conveying voters to the polling booths, were supported by the evidence, and could not be characterised as perverse, and were therefore not open to attack in appeal to the Supreme Court. *Dinabandhu Sahu* v. *Jadumoni Mangaraj*,

A I R 1954 S C 411
= 1954 S C J 605.

(1440) *S. 46 and S. 123 (8) — Government servant appointed as polling agents — Validity.*

There is nothing in the Act or in the Rules barring the appointment of a Government servant as a polling agent. Such an appointment does not 'per se' contravene S. 123 (8). Nor is there anything in the nature of the duties of a polling agent, which necessarily brings him within the prohibition enacted in that section. The duty of a polling agent is merely to identify the voter, and that could not by itself and without more, be said to further the election prospects of the candidate. So long as the polling agent confines himself to his work as such agent of merely identifying the voters, it cannot be said that S. 123 (8) has, in any manner, been infringed.

But if it is established that the presence of a Government servant of rank and importance as polling agent of one of the candidates has proved to be a source of unfair election practices and if it is made out that the candidate or his agent had abused the right to appoint a Government servant as polling agent by exploiting the situation for furthering his election prospects, then the matter can be dealt with as an infringement of S. 123 (8). *Satya Dev* v. *Padam Dev*,

A I R 1954 S C 587
= 1954 S C J 764.

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(1441) *Ss. 123 (5) and 124 (5) — Sections are not* ultra vires *Art. 19 (1) (a) — Constitution of India, Art. 19 (1) (a) and Art. 245 (1).*

Sections 123 (5) and 124 (5) are not *ultra vires* Art. 19 (1) (a) of the Constitution. These sections do not interfere with a citizen's fundamental right to freedom of speech. These laws do not stop a man from speaking. They merely prescribe conditions which must be observed if he wants to enter Parliament.

The right to stand as a candidate and contest an election is not a common law right. It is a special right created by the statute and can only be exercised on the conditions laid down by the statute. The fundamental rights chapter has no bearing on a right like this created by statute. Persons have no fundamental right to be elected members of Parliament. If they want that they must observe the rules. If they prefer to exercise their right of free speech outside these rules, the impugned sections do not stop them. These sections are *intra vires*. *Jumna Parsad* v. *Lachhi Ram*,

A I R 1954 S C 686
=1954 S C J 835.

(1442) *S. 123 (5)—Corrupt practice — Finding of fact by Tribunal — Special appeal to Supreme Court — Jurisdiction of Supreme Court to consider conclusions of fact—(Supreme Court—Special appeal — Findings of fact) — (Constitution of India, Art. 134 — Special appeal).*

In a special appeal against the decision of an Election Tribunal the Supreme Court, as a Court of appeal will not examine the conclusions of fact arrived at by the Tribunal. All that the Supreme Court is concerned with is that whether a tribunal of reasonable and unbiased men could judicially reach such a conclusion. Under the law the decision of the Tribunal is meant to be final. That does not take away the jurisdiction of the Supreme Court but it will only interfere when there is some glaring error which has resulted in a substantial miscarriage of justice :

Held that the conclusion arrived at by the Tribunal was one which judicial minds could reasonably reach and that on these findings a major corrupt practice on the part of the 1st respondent under S. 123 (5)

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of the Representation of the People Act was established. *Jumna Parsad* v. *Lachhi Ram*,
A I R 1954 S C 686
=1954 S C J 835.

(1443) *Ss. 123 (7), 77 and Rr. 117, 118 —'Persons employed for payment'—Meaning—Employment should be by candidate.*

Though S. 77 uses the words "who may be employed for payment" without indicating by whom employed or paid, the section must be read in the manner consonant with S. 123 (7) and Rr. 117 and 118 which follow the language of S. 123 (7). The gist of a corrupt practice as difined in S. 123 (7) is that the employment of extra persons and the incurring or authorising of excess expenditure must be by the candidate or his agent.

Where, therefore, a father assisted the son in the matter of the election and the persons who were the employees of the father and paid by him for working in the father's estate, assisted the son at the request of the father, which strictly speaking they were not obliged to do :

Held that *qua* the candidate the persons were neither employed nor paid by him. So far as the candidate was concerned they were mere volunteers, whose employment did not bring him within the mischief of the definition in S. 123 (7). *Ranajaya Singh* v. *Baijnath Singh*,
A I R 1954 S C 750
=1954 S C J 838.

(1444) *S. 124 (5) — Minor corrupt practice.*

Where it is found that the candidate made a systematic appeal to Chamhar voters to vote for him on the basis of his caste, this constitutes a minor corrupt practice under S. 124 (5). *Jumna Parsad* v. *Lachhi Ram*, A I R 1954 S C 686
=1954 S C J 835.

(1445) S. 125 (3) — Candidate issuing leaflet and poster not bearing the name of the printer on them—It amounts to illegal practice—Question is one of fact—Supreme Court will not interfere with findings of Election Tribunal in special appeal—(Supreme Court — Special appeal — Finding of fact). *Jumna Parsad* v. *Lachhi Ram*,
A I R 1954 S C 686
=1954 S C J 835.

REPRESENTATION OF THE PEOPLE (CONDUCT OF ELECTIONS AND ELECTION PETITIONS) RULES (1951)

(1446) *Rule 28 — Election Commission — Power to prescribe distinguishing mark.*

The Election Commission which has the power to prescribe a distinguishing mark for the ballot papers has also the power to change it. But the prescribing of a distinguishing mark as contemplated by Rule 23 must relate to the election as a whole. There can be no question of there being one distinguishing mark for some of the voters and another for others with reference to the same election and at the same polling station. *Hari Vishnu* v. *Ahmad Ishaque*
A I R 1955 S C 233.

(1447) *R. 47 — Nature of Duties of returning officer.*

The nature of the duties which a returning officer has to perform are contained in Rule 47. Under that rule, the returning officer has to automatically reject certain classes of votes for not being in conformity with the rules. They are set out under Rule 47 (1) (b) and (c). In other cases, the rejection will depend on his decision whether the conditions for their acceptance have been satisfied. *Hari Vishnu* v. *Ahmad Ishaque*, A I R 1955 S C 233.

(1448) *Rule 47 (1) (c) — Rule 47 (1) (c) is mandatory.*

The practical bearing of the distinction between a provision which is mandatory & one which is directory is that while the former must be strictly observed, in the case of the latter it is sufficient that it is substantially complied with. Rule 47 (1) (c) of the R. P. Election Rules provides that a ballot paper shall be rejected. There can be no degrees of compliance so far as rejection is concerned, and that is conclusive to show that the provision is mandatory. *Hari Vishnu* v. *Ahmad Ishaque*,
A I R 1955 S C 233.

(1449) *Rules 47 (1) (c), 28 and 23 — Change in original distinguishing mark — Stage when approval of Election Commission should be obtained — Rejection of ballot papers.*

Rule 23 throws on the polling officer the duty of delivering a proper ballot paper to the voter. If a distinguishing mark had been prescribed under Rule 28, the ballot paper to be delivered must bear that mark. Therefore, if any change or alteration of the original distinguishing mark is made

it must be made before the commencement of the poll, and the ballot paper should contain the new distinguishing mark. The approval by the Election Commission subsequent to the polling, therefore, cannot render valid the ballot papers which did not bear the distinguishing mark prescribed for the election, and they are liable to be rejected under Rule 47 (1) (c). *Hari Vishnu* v. *Ahmad Ishaque*,

A I R 1955 S C 233.

(1450) *R. 47 (4) — Review of decision of Returning Officer — Extent of power of Election Tribunal.*

Under R. 47 (4) the Election Tribunal is constituted a Court of appeal against the decision of the Returning officer, and as such its jurisdiction must be co-existant with that of the Returning officer and cannot extend further. If the Returning Officer has no power under Rule 47 to accept the vote which has not the distinguishing mark prescribed by Rule 28 on the ground that it was due to the mistake of the presiding officer in delivering the wrong ballot paper the Election Tribunal reviewing this decision under R. 47 (4) can have no such power. It cannot accept a ballot paper which the Returning Officer was bound to reject under Rule 47. *Hari Vishnu* v. *Ahmad Ishaque*,

A I R 1955 S C 233.

REQUISITIONED LAND (CONTINUANCE OF POWERS) ORDINANCE (19 of 1946)

(1451) *Cl. 3—Construction—Cl. 3 covers requisition order, expiry of which was limited for definite period—Civil P. C. (1908), Preamble—Interpretation of Statutes—Non-obstante clause) — (Interpretation of Statutes—Non obstante-clause).*

Although ordinarily there should be a close approximation between the non-obstante clause and the operative part of the section, the non-obstante clause need not necessarily and always be co-extensive with the operative part, so as to have the effect of cutting down the clear terms of an enactment. If the words of the enactment are clear and are capable of only one interpretation on a plain and grammatical construction of the words thereof, a non-obstante clause cannot cut down that construction and restrict the scope of its operation. In such cases the non-obstante clause has to

be read as clarifying the whole position and must be understood to have been incorporated in the enactment by the Legislature by way of abundant caution and not by way of limiting the ambit and scope of the operative part of the enactment.

Whatever may have been the presumed or the expressed intention of the legislating authority when enacting Ordinance 19 of 1946, the words of Cl. 3 read along with the definition of requisitioned land contained in Cl. 2 (3) of the Ordinance are quite clear and it would not be within the province of the Courts to speculate as to what was intended to be covered by Cl. 3 of the Ordinance when the only interpretation which could be put upon the terms thereof is that all requisitioned lands, that is, all immoveable properties which when the Defence of India Act, 1939, expired were subject to any requisition effected under the Act and the rules were to continue to be subject to requisition until the expiry of the Ordinance. No doubt measures which affect the liberty of the subject and his rights to property have got to be strictly construed. But in spite of such strict construction to be put upon the provisions of this Ordinance one cannot get away from the fact that the express provision of Cl. 3 of the Ordinance covered all cases of immoveable properties which on 30-9-1946 were subject to any requisition effected under the Act and the rules, whether the requisition was effected for a limited duration or for an indefinite period. Even those requisition orders, which by accident or design were to expire on 30-9-1946 would come to an end not only because the fixed term expired but also because the Act and the rules expired on that date and were therefore covered by Cl. 3 read along with the definition in Cl. 2 (3) of the Ordinance and were by the clear terms thereof continued until the expiry of the Ordinance.

The non-obstante clause appearing in Cl. 3 viz, "notwithstanding the expiration of the Defence of India Act, 1939 (35 of 1939) and the rules made thereunder," cannot be invoked in support of the submission that those orders which would have ceased to be operative and come to an end with the expiration of the Act and the rules were the only orders which were intended to be continued under Cl. 3 of the Ordinance, and not those orders which by reason of their

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inherent weakness such as the limitation of the period of duration expire ipso facto on the date of the expiration of the Act and the rules.

Courts are not concerned with the equities of individual cases. There may be cases in which the Ordinance worked to the prejudice of the owner of the requisitioned land. In such cases the necessary relief could be granted by the appropriate Government by releasing the immoveable property from requisition. But the Courts would be helpless in the matter. Once the conclusion was reached that a particular measure was lawfully enacted by a legislative authority covering the particular case in question the hands of the Court would be tied and the legislative measure would have to be given its legitimate effect, unless mala fides or abuse of power were alleged.

The Collector of Bombay in exercise of the powers conferred upon him by R. 75-A (1) of the Defence of India Rules read with the Notification of the Government, Defence Co-ordination Department. No 1336/OR/1/42, dated 15-4-1943, passed an order requisitioning certain premises. The material portion of the order was that "the property shall be continued in requisition during the period of the present war and six months thereafter or for such shorter period as may be specified by the Food Controller, Bombay. . . . ."

Held that the order was continued under Cl. 3 of the Ordinance. *Dominion of India* v. *Shrinbai*,

A I R 1954 S C 596
=1954 S C J 813.

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(1452) *Fishery—Limitation Act (1908), Art. 144.*

An exclusive right of fishing in a given place means that no other person has a co-extensive right with the claimant of the right. The mere fact that some other person has a right to a particular class of fish in the fishery or that another person is entitled to fish at a certain time of the year does not destory the right of exclusive fishing in any manner. *Braja Sunder Deb* v. *Moni Behara*,

A I R 1951 S C 247
=1951 S C J 363
=1951 S C R 431.

SALE OF GOODS ACT (1930)

(1453) *S. 4—Sale of Goods—Constitution of India, Sch. 7 List 2, Entry 54) —Sales Tax—Bombay Sales Tax Act (24 of 1952), S. 2. (14).*

The expression "Sale of Goods" is found to consist of a number of ingredients which can be said to be essential in the sense that if any one of them is missing there is no sale. The following are some of them (1) the existence of the goods which form the subject-matter of the sale, (2) the bargain or contract which when executed, will result in the passing of the property in the goods for a price, (3) the payment, or promise of payment, of a price, (4) the passing of the title. *State of Bombay* v. *United Motors Limited*,

A I R 1953 S C 252
=1953 S C R 1069
=1953 S C J 373.

(1454) *S. 30 (2) — Consent — Agents consent — (Contract Act (1872), S. 188).*

The consent of a person, who is acting as agent of the owner, would be as effective as the consent of the owner himself. *Central National Bank* v. *United Industrial Bank Ltd.*,

A I R 1954 S C 181
=1954 S C R 391=1954 S C J 84.

(1455) *S. 30 (2) — Consent—Meaning and implication—Effect of fraud or false representation — (Contract Act (1872), Ss. 13 and 14) — (Sale of Goods Act (1930), S. 2 (15)).*

When the transfer of possession is voidable merely by reason of its being induced by fraud, which can be rescinded at the option of the owner, the consent which followed false representation is a sufficient consent within the meaning of S. 30 (2). But where the fraud induced an error regarding the identity of the person to whom or the property in respect of which possession was given, the whole thing is void and there is no consent in the sense of an agreement of two persons on the same thing in the same sense.

A consent induced by false representation may not be free, but it can nevertheless be real, and ordinarily the effect of fraud or misrepresentation is to render a transaction voidable only and not void. If an innocent purchaser or pledgee obtains goods from the person in possession thereof, whose possessory right is defeasible on the ground of fraud but had not actually been defeated at the time when the transaction took place, there is no reason why the rights

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of such innocent purchaser or pledgee should not be protected. The right in the possessor or bailee in such circumstances is determinable no doubt, but so long as it is not determined it is sufficient to enable him to create title in favour of an innocent transferee for value without notice.

The position, however, is entirely different if the fraud committed is of such a character as would prevent there being consent at all on the part of the owner to give possession of the goods to a particular person. Thus A might obtain possession of goods from the owner by falsely representing himself to be B. In such cases the owner can never have consented to the possession of goods by A; the so-called consent being not a real consent is a totally void thing in law.

It does not make any difference in the application of the principles stated above if the fraud or deception, practised by a person in obtaining possession of goods from the owner, is of such a character as to make him guilty of a criminal offence. What S. 30 (2) contemplates, is that the buyer, to whom the property in the goods sold has not passed as yet, must obtain possession of the goods with the consent of the seller before he can give a title to an innocent purchaser or pledgee. There can be no dispute that to establish consent of the owner of the goods, it is his state of mind that is the only material thing for consideration and not that of the receiver of the goods. Even if the owner was induced to part with the goods by fraudulent misrepresentation he must yet be held to have consented to give possession; and the fact that the receiver had a dishonest intention or a preconcerted design to steal or misappropriated them may make him liable for a criminal offence, but the consent of the owner actually given cannot be annulled thereby. In order that a fraudulent receiver of goods must be punished criminally the material thing is his dishonest intention; but that is altogether immaterial for the purpose of determining whether there was consent on the part of the owner of the goods under the Sale of Goods Act.

Whether there is consent or not has to be proved as a fact in accordance with the principles of the Law of Contract and when it is proved to exist its existence cannot be nullified by application of any rule of criminal law.

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(On the facts and circumstances of this case, consent of the owner for possession of shares (goods) held not proved). *Central National Bank Ltd.* v. *United Industrial Bank Ltd.*, A I R 1954 S C 181 =1954 S C R 391=1954 S C J 84.

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BOMBAY SALES TAX ACT (24 OF 1952)

(1456) *Ss. 2 (14), 5 and 10—Rules framed under Act, Rules 5 and 6 — Validity of Act and Rules.*

Per *Majority* — The Bombay Sales Tax Act, 1952, does not in terms exclude from its purview the sales or purchases taking place outside the State of Bombay while it does include, by Explanation (2) to the definition of "sale" in S. 2 (14), the sales or purchases under which the delivery and consumption take place in Bombay which, by virtue of the Explanation to Art. 286 (1) (a), Constitution of India, are to be regarded as local sales or purchases. On the construction placed upon that Explanation (*see* Pt. (a) above), sales or purchases effected in Bombay in respect of goods in Bombay but delivered for consumption outside Bombay are not taxable in Bombay. The charging sections, namely, Ss. 5, 10 and 18, do not cover the class of sales or purchases which, on the construction of the Explanation to Art. 286 (1) are to be regarded as taking place outside the State of Bombay. The Act thus does not contravene the provisions of Art. 286 (1) (a) by purporting to charge sales or purchases excluded by that Article from State-taxation.

On the date when the tax became leviable under the Act, sales or purchases of the kind described under Art. 286 (1) (b) and (2) stood in fact excluded from taxation by virtue of Rules 5 and 6 made under S. 45 of the said Act and the State of Bombay cannot be considered to have made a "law imposing or authorising the imposition of a tax" on sales or purchases excluded under the aforesaid clauses of Art. 286. The Act and the Rules having been brought into operation simultaneously, there is no reason why the Rules framed in exercise of the power delegated by the Legislature should not be regarded as part of the "law" made by the State: A I R 1951 S C 332, *Rel. on.*

But R. 5 (2) (i) is *ultra vires* the rule-making authority and therefore void. But it is clearly severable from R. 5 (1) (i).

Sales Tax—C. P. and Berar Sales Tax Act (1947)

The restriction regarding the mode of transport of the goods sold or purchased in the course of inter-State trade to which alone sub-r. (2) (i) relates can be ignored and the exemption under R. 5 (1) (i) may well be allowed to stand: 55 Bom L R 216, REVERSED. *State of Bombay* v. *United Motors Ltd.*, **A I R 1953 S C 252 =1953 S C R 1069=1953 S C J 373.**

(1457) *Ss. 5 and 10 — Sections are not discriminatory—(Constitution of India, Art. 14).*

The contention that the charging Ss. 5 and 10 fixing Rs. 30,000 and 5,000 as the minimum taxable turnover for general tax and special tax respectively are discriminatory and void under Art. 14 read with Art. 13 of the Constitution is unacceptable. No discrimination is involved in this classification which is perfectly reasonable when it is borne in mind that the State may not consider it administratively worthwhile to tax sales by small traders who have no organisational facilities for collecting the tax from their buyers and turn it over to the Government. Each State must, in imposing a tax of this nature, fix its own limits below which it does not consider it administratively feasible or worthwhile to impose the tax. *State of Bombay* v. *United Motors Ltd.*, **A I R 1953 S C 252 =1955 S C R 1069 = 1953 S C J 373.**

C. P. AND BERAR SALES TAX ACT (21 OF 1947)

(1458) *S. 22 (1) Proviso — Amendment of proviso by Act 17 of 1949 does not apply to proceedings commenced before amendment—(Interpretation of Statutes—Retrospective effect).*

A right of appeal is not merely a matter of procedure. It is a matter of substantive right. This right of appeal from the decision of an inferior tribunal to a superior tribunal becomes vested in a party when proceedings are first initiated in, and before a decision is given by, the inferior Court. Such a vested right cannot be taken away except by express enactment or necessary intendment. An intention to interfere with or to impair or imperil such a vested right cannot be presumed unless such intention be clearly manifested by express words or necessary implication.

The amendment of S. 22 proviso has placed a substantial restriction on the assessee's right of appeal, for the amended section requires the payment of the entire assessed amount as a condition precedent to the admission of its appeal. The imposition of such a restriction by amendment of the section cannot affect the assessee's right of appeal from a decision in proceedings which commenced prior to such amendment and which right of appeal was free from such restriction under the section as it stood at the time of the commencement of the proceedings.

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The fact that the pre-existing right of appeal continues to exist must, in its turn, necessarily imply that the old law which created that right of appeal must also exist to support the continuation of that right. As the old law continues to exist for the purpose of supporting the pre-existing right of appeal that old law must govern the exercise and enforcement of that right of appeal and there can then be no question of the amended provision preventing the exercise of that right. The argument that the authority has no option or jurisdiction to admit the appeal unless it be accompanied by the deposit of the assessed tax as required by the amended proviso to S. 22 (1) of the Act overlooks the fact of existence of the old law for the purpose of supporting the per-existing right and really amounts to begging the question. The new proviso is wholly inapplicable in such a situation and the jurisdiction of the authority has to be exercised under the old law which so continues to exist. *H. K. Dada (India) Ltd.*, v. *State of M. P.*, **A I R 1953 S C 221.**

(1459) *as amended by Act (15 of 1949), S. 2 (g), Explanation 2 — Validity — (Constitution of India, Arts. 286, 301 and 304).*

The correctness of the view of the High Court in A I R 1952 Nag 378 that the new Explanation II to S. 2 (g) was ultra vires the State Legislature and that the mere production of goods was not enough to make the tax payable unless the goods were appropriated to a particular contract cannot be questioned by reason of the decision in A I R 1953 S C 252. *Himamat Lal Hari Lal* v. *State of M. P.*, **A I R 1954 S C 403=1954 S C J 445.**

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MADRAS GENERAL SALES TAX ACT (9 OF 1939)

(1460) *Pre. — Validity of Act — (Government of India Act (1935), Sch. VII, List II, Entry 48) — (Constitution of India, Sch. VII, List II, Item 54).*

The Madras General Sales Tax Act (9 of 1939) is enacted by the Provincial Legislature in exercise of the power vested in it by S. 100 (3), Government of India Act, 1935, read with Sch. VII, List II, Entry 48. The entry does not suggest that a legislation imposing tax on sale of goods can be made only in respect of sales taking place within the boundaries of the province. All that S. 100 (3) provides is that a law can be passed by a Provincial Legislature for purposes of the province itself. It admits of no dispute that a Provincial Legislature cannot pass a taxation statute which would be binding on any other part of India outside the limits of the province, but it will be quite competent to enact a legislation imposing taxes on transactions concluded outside the province, provided that there is sufficient and a real territorial nexus between such transactions and the taxing province. If, therefore, in the Madras Sales Tax Act the basis adopted for taxation is the location of the place of business or of the goods sold, within the province of Madras, undoubtedly it will be a valid piece of legislation to which no objection on constitutional grounds could be taken: AIR 1948 P C 118 and A I R 1953 S C 252, *Rel. on. Poppat Lal Shah* v. *State of Madras*, **A I R 1953 S C 274 =1953 S C R 677=1953 S C J 369.**

(1461) *S. 3—Transaction of sale completed within another Province.*

The mere fact that the contract for sale is entered into within the Province of Madras does not make the transaction, which is completed within another Province, where the property in the goods passes, a sale within the Province of Madras according to the provisions of the Madras Sales Tax Act as it stood before its amendment in 1947 and no tax can be levied upon such a transaction under the then provisions of the Act. A contract of sale becomes a sale under the Sale of Goods Act only when the property in the goods is transferred to the buyer under the terms of the contract itself.

The presence of the goods within the Province at the time of the contract would make the sale, if subsequently completed, a

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sale within the Province by reason of *Expln.* 2 added by Madras Act 25 of 1947. *Poppat Lal Shah* v. *State of Madras*, **A I R 1953 S C 274 =1953 S C R 677=1953 S C J 369.**

(1462) *S. 2 (h) (before its amendment in 1947) — Connotation of 'sale'— (Constitution of India, Sch. VII, List II, Item 54) — (Sale of Goods Act (1930), S. 4).*

The expression "sale of goods" is a composite expression consisting of various ingredients or elements. Thus, there are the elements of a bargain or contract of sale the payment or promise of payment of price, the delivery of goods and the actual passing of title, and each one of them is essential to a transaction of sale though the sale is not completed or concluded unless the purchaser becomes the owner of the property.

The word 'sale' in its legal sense imports passing of the property in the goods and it is in this sense that the word is used in the Sale of Goods Act. In the popular sense, however, it signifies the transaction itself which results in the passing of the property. The stress is laid in the definition of the word "sale" in S. 2 (h) of the Madras General Sales Tax Act on the element of transfer of property in a sale and no other. The language gives no indication of the popular meaning of sale in which the word is used. *Poppat Lal Shah* v. *State of Madras*, **A I R 1953 S C 274 =1953 S C R 677=1953 S C J 369.**

MADRAS TURNOVER AND ASSESSMENT RULES (1939)

(1463) *R. 16 (5)—Validity—Sales Tax — (Madras General Sales Tax Act (9 of 1939), S. 5 (vi)).*

Rule 16 (5) of the Turnover and Assessment Rules 1939, framed under the Madras Act, 9 of 1939 contravenes, S. 5 (vi) of the Act and is therefore, *ultra vires*. The Sub-rule is however severable and does not affect the validity of the other rules. A I R 1953 Mad 105, *Affirmed. V. M. Sayed Mohammad & Co.* v. *State of Andhra*, **A I R 1954 S C 314=1954 S C J 390.**

U. P. SALES TAX ACT (15 of 1948)

(1463-A) *Ss. 2 (h) and 3-B—Imposition of tax on forward contracts—.Validity— (Government of India Act (1935), Sch. VII, List 2, Entry 48) — (Sale of Goods Act (1930), S. 4).*

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Under the statute law of India, that is, the Sale of Goods Act, 1930, which is based on English law on the subject, a sale of goods and an agreement for the sale of goods are treated as two distinct and separate matters, the vital point of distinction between them being that whereas in a sale there is a transfer of property in the goods from the seller to the buyer, there is none in an agreement to sell. Therefore, there having existed at the time of the enactment of the Government of India Act, 1935, a well-defined and well-established distinction between a sale and an agreement to sell it would be proper to interpret the expression "sale of goods" in Entry 48 in the sense in which it was used in legislation both in England and India and to hold that it authorises the imposition of a Tax only when there is a completed sale involving transfer of title, and not when there is a mere agreement to sell. The State Legislature cannot by enlarging the definition of "sale" as including forward contracts, arrogate to itself a power which is not conferred upon it by the Constitution Act, and the definition of "sale" in S. 2 (h) of the U. P. Sales Tax Act must, to that extent, be declared ultra vires. For the same reason, Explanation III to S. 2 (h) which provides that forward contracts "shall be deemed to have been completed on the date originally agreed upon delivery", and S. 3-B which enacts that "Notwithstanding anything contained in S. 3, the turnover of any dealer in respect of transactions of forward contracts, in which goods are not actually delivered, shall be taxed at a rate not exceeding rupees two per unit as may be prescribed", must also be held to be ultra vires.

This conclusion is further strengthened, when regard is had to the nature of the levy. The substance of the matter is that the sales tax is a levy on the price of the goods, and the reason of the thing requires that such a levy should not be made, unless the stage has been reached when the seller can recover the price under the contract. It is well settled that an action for price is maintainable only when there is a sale involving transfer of the property in the goods to the purchaser. Where there is only an agreement to sell then the remedy of the seller is to sue for damages for breach of contract and not for the price of the goods. The position therefore, is that a liability to

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be assessed to sales tax can arise only if there is a completed sale under which price is paid or is payable and not when there is only an agreement to sell, which can only result in a claim for damages. It would be contrary to all principles to hold that damages for breach of contract are liable to be assessed to sales tax on the ground that they are in the same position as sale price. *Sales Tax Officer* v. *Budh Parkash Jai Parkash*, **A I R 1954 S C 459 =1954 S C J 573.**

SHOLAPUR SPINNING AND WEAVING COMPANY (EMERGENCY PROVISIONS) ACT (28 of 1950) — SHOLAPUR SPINNING AND WEAVING COMPANY (EMERGENCY PROVISIONS) ORDINANCE (2 of 1950).

(1464) *If invalid on ground of legislative incompetency—Constitution of India, Sch. 7, Union List, Entry 43.*

The Act in question and the Ordinance 2 of 1950 which preceded the Act, are clearly covered by Entry 33, List I, Sch. 7, Government of India Act, 1935, and the corresponding Entry 43 of the Union List set out in Sch. 7 to the Constitution, and the Ordinance and the Act cannot be held to be invalid on the ground of legislative incompetency of the authority promulgating or passing the same. *Charanjit Lal* v. *Union of India*, **A I R 1951 S C 41 =1951 S C J 29=1950 S C R 869.**

(1465) *Validity—Constitution of India, Arts. 31, 19 and 14.*

Per *Kania C. J., Fazl Ali, Mukherjea and Das JJ.* — The Act does not infringe the fundamental rights conferred on a share-holder of the Sholapur Spinning and Weaving Company by Art. 19 (1) (f) or 31, Constitution of India, and the Act is not unconstitutional and void on that ground. The right to dispose of the share and the right to receive dividend, if any, or to participate in the surplus in the case of winding up that have been left to the shareholder cannot be said to be illusory or practically valueless, because the right to control the management by directors elected by him, the right to pass resolutions giving directions to the directors and the right to present a winding up petition have, for the time being, been suspended. The rights still

possessed by the share-holder are the most important of the rights constituting his "property", although certain privileges incidental to the ownership have been put in abeyance for the time being. It is impossible to say that the Act has deprived the share-holder of his "property" in the sense in which that word is used in Arts. 19 (1) (f) and 31. The curtailment of the incidental privileges, namely the right to elect directors, to pass resolutions and to apply for winding up may well be supported as a reasonable restraint on the exercise and enjoyment of the share-holder's right of property imposed in the interest of the general public under Art. 19 (5), namely, to secure the supply of an essential commodity and to prevent unemployment.

(Per *Kania C. J., Fazl Ali and Mukherjea JJ; Patanjali Sastri and Das JJ.*, Contra):—Nor does the Act run contrary to Art. 14 of the Constitution. The Act cannot be assailed on that ground also.

Per *Patanjali Sastri and Das JJ.* — The impugned Act denies to the shareholders of the particular Company the protection of the law relating to incorporated joint stock companies in this country as embodied in the Companies Act and is prima facie within the inhibition of Art. 14.

The impugned Act, which selects a particular Company and imposes upon it and its share-holders burdens and disabilities on the ground of mismanagement and neglect of duty on the part of those charged with the conduct of its undertaking, is plainly discriminatory in character and is within the constitutional inhibition of Art. 14.

The Act on its face does not purport to make any classification at all or to specify any special vice to which this particular Company and its share-holders are subject and which is not to be found in other companies and their share-holders so as to justify any special treatment. Therefore, this Act *ex facie* is nothing but an arbitrary selection of this particular company and its share-holders for discriminating and hostile treatment and read by itself is palpably an infringement of Art. 14 of the Constitution.

Per *Mukherjea J.*— A corporation, which is engaged in production of a commodity vitally essential to the community, has a

social character of its own and it must not be regarded as the concern primarily or only of those who invest their money in it. If its possibilities are large and it had a prosperous and useful career for a long period of time and is about to collapse not for any economic reason but through sheer perversity of the controlling authority, one cannot say that the legislature has no authority to treat it as a class by itself and make special legislation applicable to it alone in the interests of the Community at large. *Charanjit Lal* v. *Union of India*,

A I R 1951 S C 41
1951 S C J 29=1950 S C R 869.

(1466) *Validity — (Constitution of India, Arts. 13 and 31).*

The Sholapur Spinning and Weaving Company (Emergency Provisions) Ordinance (2 of 1950) and Act (28 of 1950) which has replaced the Ordinance, offend Art. 31(2) of the Constitution of India and as such are unconstitutional and void. A I R 1951 Bom 86, *Reversed;* A I R 1951 S C 41, *Distinguished.*

Per *Patanjali Sastri C. J.* — The impugned Ordinance authorises, in effect, a deprivation of the property of the Company within the meaning of Art. 31 without compensation and is not covered by the exception in cl. (5) (b) (ii) of that Article. The ordinance thus violates the fundamental right of the Company under Art. 31 (2).

Per *Mahajan J.*— The impugned statute has overstepped the limits of legitimate social control legislation and has infringed the fundamental right of the company guaranteed to it under Art. 31 (2) of the Constitution and is, therefore, unconstitutional. By promulgating this Ordinance the Government has not merely taken over the superintendence of the affairs of the company but has in effect and substance taken over the undertaking itself. It is one thing to superintend the affairs of a concern and it is quite another thing to take over its affairs and then proceed to carry on its trade through agents appointed by the State itself. Under the guise of superintendence the State is carrying on the business or trade for which the company was incorporated, with the capital of the company

but through its own agents who take orders from it and are appointed by it and in the appointment and dismissal of whom the shareholders have absolutely no voice. The purpose of taking over the company's undertaking is a public purpose, namely, to keep the labour going and contented and to maintain the supply of essential commodity. The company is debarred from carrying on its business in the manner and according to the terms of its charter. Its old complexion stands changed by the terms of the Ordinance. The Ordinance overrides the directors, deprives the shareholders of their legal rights and privileges and completely puts an end to the contract of the managing agents. Without there being any vacancy in the number of directors new directors step in and old directors and managing agents stand dismissed. Exercise of any power by them under the articles is subject to heavy penalties. In this situation it is not possible to subscribe to the contention that the effect of the Ordinance is that the Central Government has taken over the superintendence of the affairs of the company and that the impugned legislation is merely regulative in character.

Per *S. R. Das J.* — It is impossible to uphold this law as an instance of the exercise of the States' police power as an emergency measure. It has far overstepped the limits of police power and is, in substance, nothing short of expropriation by way of the exercise of the power of eminent domain and as the law has not provided for any compensation it must be held to offend the provisions of Art. 31 (2). *Dwarkadas Sriniwas* v. *Sholapur Spinning and Weaving Co.*, **A I R 1954 S C 119 =1954 S C R 674=1954 S C J 175.**

SOLDIERS (LITIGATION) ACT (1925)

(1467) *S. 11—Disability is personal.*

Where the plaintiff is on military service and as such obtains an extended period of limitation, the privilege being a personal one his brother cannot take advantage of it. *Kura* v. *Jag Ram*, **A I R 1954 S C 269.**

SPECIFIC RELIEF ACT (1877)

(1468) *S. 15—Relinquishment.*

Relinquishment of the claim to further performance can be made at any stage of the litigation. *Kalyanpur Lime Works* v. *State of Bihar*, **A I R 1954 S C 165 =1954 S C R 958=1954 S C J 49.**

(1469) *Ss. 15 and 18 (a) — Lease by Government having imperfect title.*

Where, when the Government entered into the contract to grant a lease to *A* it had an imperfect title, inasmuch as it could not grant a fresh lease to anyone during the existence of the previous lease in favour of *B* and when the lease in favour of *B* expired, the impediment in the way of the Government to grant leases stood removed and *A's* right to get the leases revived in his favour:

Held that S. 18 was attracted to the facts of this case, but as a substantial period of the lease had already expired, relief could be given only under S. 15. *Kalyanpur Lime Works* v. *State of Bihar*, **A I R 1954 S C 165 =1954 S C R 958=1954 S C J 49.**

(1470) *S. 27 — Suit for specific performance by prior purchaser against his vendor and subsequent purchaser—Proper form of decree— (T. P. Act (1882), S. 40) —(Decree).*

Where there is a sale of the same property in favour of a prior and subsequent transferee and the subsequent transferee has, under the conveyance outstanding in his favour, paid the purchase money to the vendor, then in a suit for specific performance brought by the prior transferee, in case he succeeds, the question arises as to the proper form of decree in such a case. The practice of the Courts in India has not been uniform and three distinct lines of thought emerge. According to one point of view, the proper form of decree is to declare the subsequent purchase void as against the prior transferee and direct conveyance by the vendor alone. A second considers that both vendor and vendee should join, while a third would limit execution of the conveyance to the subsequent purchaser alone. According to the Supreme Court, the proper form of decree is to direct specific performance of the contract between the vendor and the prior transferee and direct the subsequent transferee to join in the conveyance so as to pass on the title which resides in him to the prior transferee. He does not join in any special

covenants made between the prior transferee and his vendor; all he does is to pass on his title to the prior transferee. A I R 1931 Cal 67, *Appr.*, A I R 1932 All 694, *Not Appr.*; (1846) 67 E R 1057, *Ref.*

Further, it may not be right to lay down that in every case the balance of the purchase-money should be paid to the subsequent transferee up to the extent of the consideration paid by him. There may be equities between the vendor and the subquent transferee which would make that improper, so unless they fight the question out as between themselves and it is decided as an issue in the case, the normal rule should be to require that the money be paid to the vendor. However, there may be exception to this normal course arising, as it did in this case, out of circumstances peculiar to the case. *Durga Prasad* v. *Deep Chand*, **A I R 1954 S C 75.**

(1471) *S. 27A — Transfer of Property Act (1882), S. 53A — Contract of lease — Part performance—Plea of.*

By S. 27A, Specific Relief Act, the legislature has recognised that in cases of lease, the equity of part performance is an active equity as in English law and is sufficient to support an independent action by the plaintiff. The section has however no application to contracts executed before 1st April 1930 though in such cases the defence under S. 53A, T. P. Act, is available to a person who has an agreement of lease in his favour though no lease has been executed and registered. *Manek Lal* v. *H. J. Ginwalla & Sons*, **A I R 1950 S C 1 =1950 S C R 75=1950 S C J 317.**

(1472) *S. 45 — Scope— Order against person holding public office — 'Any law' confined to statute law — Permission to construct cinema in Greater Bombay granted by Commissioner of Police — Permission cancelled by State Government—Commissioner of Police acting as transmitting agent — Order under S. 45 directing Commissioner to withdraw cancellation or to grant permission if can be passed — City of Bombay Police Act (4 of 1902), S. 22 —Rules for Licensing and Controlling Theatres and other Places of Public Amusement in Bombay City (1914), R. 250 — Scope of—Power to cancel permission once granted whether vests in State Government.*

The jurisdiction conferred by that S. 45 is very special in kind and is strictly limited in extent though the ambit of the powers

exercisable within those limits is wide. Among the limitations imposed are the following: First, the order can only direct some specific act to be done or some specific act to be forborne. It is not possible therefore to give a mere declaratory relief as under S. 42. Next, because of the proviso, the order can only be made if the doing or the forbearing is clearly incumbent upon the authority concerned under any law for the time being in force. And thirdly, there must be no other specific and adequate legal remedies available to the applicant.

The respondent wanted to build a cinema house in a part of Greater Bombay. He obtained the necessary permission from the Commissioner of Police, in exercise of the discretion vested in him to grant a license under S. 22 of the City of Bombay Police Act, 1902. Later the permission was suspended by the Commissioner and the respondent was told to await the orders of the Government. Shortly after, the Commissioner sent the respondent the following communication: "I am directed by the Government to inform you that the permission to erect a cinema granted to you is hereby cancalled". The respondent applied for an order in the nature of a mandamus under S. 45, Specific Relief Act, against the Commissioner of Police. The reliefs sought were (1) an order directing the Commissioner to withdraw the cancellation and/or (2) directing him to grant permission for the erection of a cinema, and such further and other relief as the nature and circumstances of the case might require.

Held (i) that under the Rules framed under S. 22, City of Bombay Police Act, the only person vested with authority to grant or refuse a license for the erection of a building to be used for purposes of public amusement was the Commissioner of Police. It was also clear that under Rule 250 he has been vested with the absolute discretion at any time to cancel or suspend any license which had been granted under the rules. But the power to do so was vested in him and not in the State Government and could only be exercised by him at his discretion.

(ii) Rule 250 authorised the cancellation of a license already issued.

(iii) The order of cancellation was not an order by the Commissioner but merely intimation by him of an order passed by another authority, namely, the Government of Bombay. As the only person who could

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effect the cancellation was the Commissioner of Police, there was no valid order of cancellation. In this view the license still held good. Accordingly, the second relief could not be granted.

(iv) So far as the first relief was concerned, it could not be granted in the form in which it was sought because the rules vested the Commissioner with an absolute discretion to cancel at any time the license once granted. But he could be granted a modification of that relief in a different form. (Under the modified order the Commissioner was directed to consider the requests made for cancellation of the license and after bringing to bear his unfettered judgment on the subject, himself to issue a definite order cancelling or refusing to cancel the license.)

(v) The discretion vested in the Commissioner of Police under Rule 250 had been conferred upon him for public reasons involving the convenience, safety, morality and welfare of the public at large. An enabling power of this kind conferred for public reasons and for the public benefit was coupled with a duty to exercise it when the circumstances so demanded. It was a duty which could not be shirked or shelved nor could it be evaded; performance of it could be compelled under S. 45.

(vi) The words "any law" in S. 45 were wide enough to embrace all kinds of law and were not confined to statute law. There was no reason why statutory duties should be placed on any different plane from other duties enjoined by any other kind of law, especially as some statutory duties are slight or trivial when compared to certain other kinds of duties which are not referable to a statutory provision.

(vii) The respondent had no other adequate remedy in this case. The dangerous course of ignoring the official order of cancellation at one's peril was not the kind of adequate and specific relief contemplated by S. 45. Nor could the relief of injunction be considered adequate to meet the exigencies of the case. *Commr. of Police* v. *Gordhandas*, **A I R 1952 S C 16 =1951 S C J 803=1952 S C R 135.**

(1473) *S. 46 —Demand and denial of justice.*

The demand and denial which S. 46 requires are matters of substance and not of form.

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An evasion or shelving of a demand for justice is sufficient to operate as a denial within the meaning of S. 46. *Commr. of Police* v. *Gordhandas*,

A I R 1952 S C 16=1951 S C J 803 =1952 SCR 135.

(1474) *S. 54—Lease of brick fields — Stipulation for forfeiture of material if not removed before expiry of lease—Permanent injunction against removal after expiry of lease can be granted.*

Where a lease of certain brick fields provided for the forfeiture of material remaining on the land after the expiry of the lease, there can be no objection to the granting of a permanent injunction to restrain the tenants from removing or otherwise disposing of the articles on the land after the expiry of the lease, after the materials have become the property of the landlord: 33 Mad. 452, A. I. R. (2) 1915 Cal. 23 & 13 Mad. 454, *Disting. Karnani Industrial Bank* v. *Province of Bengal*,

A I R 1951 S C 285. =1951 S C J 407= 1951 S C R 560

STAMP ACT (1899)

(1475) *S. 57 — Revenue Authority — Duty of — Right of parties affected by assessment to demand reference.*

The power to make a reference under S. 57 is not only for the benefit of the Chief Controlling Revenue Authority but enures also for the benefit of the party affected by the assessment and can be demanded to be used also by such a party. It is coupled with a duty cast on him, as a public officer to do the right thing and when an important and intricate question of law in respect of the construction of a document arises, as a public servant it is his duty to make the reference. If he omits to do so it is within the power of the Court to direct him to discharge that duty and make a reference to the Court: A. I. R (35) 1948 Bom 254, *Affirmed. C. C. Revenue Authority* v. *M. S. Mills*, **A I R 1950 S C 218 =1950 S C J 444=1950 S C R 536.**

SUCCESSION ACT (1925)

(1476) *Ss. 63, 222 — Due execution of will — Proof of — Effect of non-registration.*

A testator had no male issue but had only one minor daughter. His wife had predeceased him and he had not married a second wife. By his will he made provision

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for the marriage of his daughter out of certain specified part of his estate. The rest of his properties he gave to Thakurji. The will was not registered. It was also objected that it was an unnatural will :

Held (1) that there was nothing unnatural or unofficious about the will.

(2) That as there was nothing in law which requires the registration of a will and as wills are in a majority of cases not registered at all, to draw any inference against the genuineness of the will on the ground of its non-registration was wholly unwarranted.

(3) That the will in question was duly executed and probate should be issued. *Ishwardeo Narain Singh* v. *Kamta Devi*,

A I R 1954 S C 280.

(1477) *S. 128—Condition precedent and vesting of legacy — (Trusts Act (1882), S. 81).*

By an agreement *B* agreed to pay Rs. 50 in cash every month during the lifetime of *A* in consideration of *A* having proposed to make a bequest of a life interest to his wife and the remainder in favour of *B* and his sons. The agreement executed by *B* contained, *inter alia*, these words "if I, the executant, fail to perform the said contract the said cousin (that is, *A*) has power to have the same performed by me, the executant, through, Court." *B*, however, failed to make any payment to *A* in terms of the deed of agreement even though *A* executed the will and performed his part of the contract. In the suit brought by the heirs of *A*, they contended that the payment of Rs. 50 per month during the lifetime of *A* was a condition precedent to the vesting of the legacy in favour of *B* and that condition not having been fulfilled the legacy did not vest in *B* and that on a true construction of the terms of the will *B* acquired no vested interest in the remainder:

Held, on the construction of the agreement and the will (1) that they formed part of the same transaction, the consideration for the will being the deed of the agreement and the consideration for the agreement being the will and that the will as well as the agreement formed one contract;

(2) that the non performance of the agreement to pay by *B* constituted a failure to fulfil his obligation and *A* became entitled to pursue his rights and remedies against *B* by reason of the breach of contract by him;

(3) that the payment of Rs. 50 per month to *A* during his lifetime did not constitute a

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condition precedent to the vesting of the legacy in favour of *B* and as *A* left the will unrevoked on his death the will became effective as his last will and testament and operated to vest in *B* an interest in the remainder as therein provided: 125 E R 1106 (1108), *Disting*.

(4) that S. 81, Trusts Act, could not be availed of as the intention of *A* had to be gathered as on the date of the execution of the will and not at any subsequent time thereafter and that intention was to effect a testamentary disposition of the remainder in favour of *B*. *Raj Rani* v. *Dwarka Nath Singh*, A I R 1953 S C 205.

(1478) *S. 138 — Will—Construction.*

The testator executed a will. Clause 82 of the will was in these terms: "I give any Alambazar Garden House 'Tagore Villa' to my eldest son Purnendu Nath Tagore. On the expiry of the term of office of the Executors and Trustees, Purnendu Nath shall get the said Garden House." By Cl. 10 of the will, the testator directed that after his death, his executors and trustees shall conduct the affairs of the estate according to the rules fixed by him. For payment of the legacies, he gave the following directions in this clause: "The legacies fixed in this my present will shall have to be paid in full within fifteen years of my death and these fifteen years my estate shall be managed under the supervision of the Executors and Trustees. As to the various lagacies that I have made a mention of, in this my will, my executors and trustees shall pay up all the said legacies out of the small savings made from the income of my estate year after year. For paying up the legacies my executors and trustees shall not be competent to sell any portion of my estate or any immoveable property." Held that Cl. 10 of the will made it perfectly clear that the whole of the estate of the testator including the Alambazar house was to vest in the executors for a period of 15 years and they were to realise the income of the estate for the benefit of the legatees indicated in the will, and after the various legatees had been paid, then the estate had to be distributed as stated in the various clauses of the will. The expression "estate" out of whose income the payments mentioned in the will were to be met, could not be considered to mean — "properties other than Alambazar Garden House." Hence Purnendu Nath Tagore was only entitled to this house after

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the expiry of the term of office of the executors and trustees : 1 Cal L J 605, *Approved. Purnendu Nath* v. *Administrator-General, W. B.*, **A I R 1954 S C 41.**

(1479) *S. 222—Jurisdiction of Probate Court.*

The Court of Probate is only concerned with the question as to whether the document put forward as the last will and testament of a deceased person was duly executed and attested in accordance with law and whether at the time of such execution the testator had sound disposing mind. The question whether a particular bequest is good or bad is not within the purview of the Probate Court. *Ishwardeo Narain Singh* v. *Kamta Devi*, **A I R 1954 S C 280.**

SUITS VALUATION ACT (1887)

(1480) *S. 11—Principle — (Civil P. C. (1908), Ss. 21, 99).*

The principle that underlies S. 11, Suits Valuation Act, 1887, is that a decree passed by a Court, which would have had no jurisdiction to hear a suit or appeal but for over-valuation or under-valuation, is not to be treated as, what it would be but for the section, null and void, and that an objection to jurisdiction based on over-valuation or under-valuation, should be dealt with under that section and not otherwise.

The same principle has been adopted in S. 21, Civil P. C., with reference to the objections relating to territorial jurisdiction. The policy underlying S. 21 and S. 99, Civil P. C. and S. 11 of the Suits Valuation Act, is the same, namely, that when a case had been tried by a Court on the merits and judgment rendered, it should not be liable to be reversed purely on technical grounds, unless it had resulted in failure of justice, and the policy of the legislature has been to treat objections to jurisdiction both territorial and pecuniary as technical and not open to consideration by an appellate Court, unless there has been a prejudice on the merits.

Kiran Singh v. *Chaman Paswan*,
AIR 1954 S C 342
=1954 S C J 514.

(1481) *S. 11 — Prejudice — Errors in findings of fact — Power of appellate Court.*

The prejudice on the merits contemplated by S. 11 must be directly attributable to over-valuation or under-valuation.

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An error in a finding of fact reached on a consideration of the evidence cannot possibly be said to have been caused by over-valuation or under-valuation. Mere errors in the conclusions on the points for determination cannot, therefore, be held to be prejudice within the meaning of that section. Further, an appellate Court has no power under S. 11, S. V. Act, to rehear the appeal and to consider whether the findings of fact recorded by the lower Court are correct. *Kiran Singh* v. *Chaman Paswan*,

AIR 1954 S C 342=1954 S C J 514.

(1482) *S. 11—Nature of jurisdiction of appellate Court.*

The jurisdiction that is conferred on appellate Courts under S. 11 is an equitable one, to be exercised when there has been erroneous assumption of jurisdiction by a Subordinate Court as a result of over-valuation or under-valuation and a consequential failure of justice. It is neither possible nor even desirable to define such a jurisdiction closely, or confine it within stated bounds. It can only be predicated of it that it is in the nature of a revisional jurisdiction to be exercised with caution and for the ends of justice, whenever the facts and situations call for it. Whether there has been prejudice or not, is, accordingly, a matter to be determined on the facts of each case.

A valued his suit at Rs. 2950. The defendant did not object to the jurisdiction. On losing the suit after an elaborate trial, A appealed to the District Court which he was bound to do on his valuation. Even that decision went against A on merits. A then appealed to the High Court and the Stamp Reporter valued the plaint as Rs. 9980. A paid the additional fee and raised the contention that on the revised valuation, appeal lay to the High Court and that the decree passed by the District Court was a nullity as the Court had no jurisdiction.

Held that it would be an unfortunate state of the law, if the plaintiff who initiated proceedings in a Court of his own choice could subsequently turn round and question its jurisdiction on the ground of an error in valuation which was his own.

(2) that if clauses (a) and (b) of S. 11 are read conjunctively, notwithstanding the use of the word "or" the plaintiff would be precluded from raising the objection about jurisdiction in an appellate Court. But even

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if the two provisions are to be construed disjunctively and the parties held entitled under S. 11 (1) (b) to raise the objection for the first time in the appellate Court, even then, the requirement as to prejudice has to be satisfied, and the party who has resorted to a forum of his own choice on his own valuation cannot himself, be heard to complain of any prejudice.

(3) That, on facts, no prejudice was caused to A by his appeal having been heard by the District Court and that there were no grounds for interference under S. 11. *Kiran Singh* v. *Chaman Paswan*,

AIR 1954 S C 342=1954 S C J 514.

(1483) *S. 11—Prejudice – Mere change of forum.*

The words "unless the over-valuation or under-valuation thereof has prejudicially affected the disposal of the suit or appeal on its merits" in S. 11 clearly show that the decrees passed in such cases are liable to be interfered with in an appellate Court, not in all cases and as a matter of course, but only if prejudice such as is mentioned in the section results and that the prejudice contemplated by the section is something different from the fact of the appeal having been heard in a forum which would not have been competent to hear it on a correct valuation of the suit as ultimately determined. A I R 1924 Mad 6 (FB); A I R 1933 All 249 and A I R 1949 Pat 278 (FB), *Approved. Kiran Singh* v. *Chaman Paswan*, **AIR 1954 S C 342 =1954 S C J 514.**

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(1483-A) *Advocates enrolled in—Rights of.*

See A.I.R. 1952 S.C. 369 Under "Advocate" (No. 29) Supra.

Supreme Court Advocate (Practice in High Courts) Act, 1951 — *See* A. I. R. 1952 S. C. 369 Ibid—Powers of.

Practice.

See also (i) Acquittal.
(ii) Criminal P. C. S. 417.
(iii) Criminal Trials.
(iv) Constitution of India, Arts. 134 to 136.

(1484) *Supreme Court — Powers of — Relief not granted by Constitution — Whether can be granted.*

An omission to provide for a relief in the Constitution cannot be remedied by the S. C.

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and assumption of jurisdiction which is not warranted by the clear words of Art. 134, 135 or 136 of the Constitution will be tantamount to making legislation by the S. C. which it is never its function to do. *Janardhan Reddy* v. *The State*,

A I R 1951 S C 124=1951 S C J 93=1950 S C R 940.

(1485) Practice — Concurrent findings — Held supreme Court did not find good reason for departing from well established practice of Supreme Court of not disturbing concurrent findings of the trial Court and the first appellate Court — In the present case, held the finding that the parties were Sudras was largely based on oral evidence, and Judges of High Court in arriving at their conclusion had not overlooked the tests laid down in a series of authoritative decisions for determining the question whether a person belonged to the regenerate community or to the Sudra community. *Gur Narain Das* v. *Gur Tahal Dass*,

A I R 1952 S C 225 = 1952 S C R 869 = 1952 S C J 305.

(1486) *Practice — Criminal appeal — Interference in — (Constitution of India, Art. 134).*

In the case of the concurrent findings of fact by both the lower Courts, the Supreme Court cannot substitute its own appreciation of the evidence for those of the Courts below. The Supreme Court has, in the absence of any compelling reason, always declined to act as a third court of facts.

Held that in this case there was no reason for departing from that well recognised rule of practice adopted by the Court. *Damodram* v. *State of Travancore-Cochin*,

A I R 1953 S C 462.

(1487) *Practice — Criminal Appeal — Interference with concurrent finding of fact.*

The Supreme Court does not ordinarily interfere with a concurrent finding of fact but when the finding omits to notice very important points in the accused's favour which swing the balance the otherway, it will not let the finding stand. *Kashmira Singh* v. *State of Madhya Pradesh*,

A I R 1952 S C 159=1952 S C R 526=1952 S C J 201.

(1488) *Practice — Criminal appeal — Grounds which may be urged in.*

The assumption that once an appeal has been admitted by special leave, the entire

case is at large and the appellant is free to contest all the findings of fact and raise every point which could be raised in the High Court or the trial Court is entirely unwarranted. Only those points can be urged at the final hearing of the appeal before the Supreme Court which are fit to be urged at the preliminary stage when leave to appeal is asked for, and it would be illogical to adopt different standards at two different stages of the same case : 1914 A. C. 615, *Rel. on. Pritam Singh* v. *The State*, **A I R 1950 S C 169 = 1950 S C R 453.**

(1489) *Practice — Decision on points not raised.*

It is not the practice of the Supreme Court to decide questions which are not properly raised before it or which do not arise directly for decision. *State of Madras* v. *C. C. Menon*, **A I R 1954 S C 517 = 1954 S C J 621.**

(1490) *Practice—New plea—(Civil P. C. (1908), S. 112, O. 8, R. 2, O. 14, R. 1, O. 41, R. 1).*

Certain aspect of the case not raised by respondent in his grounds of appeal to High Court or in the case filed for the respondent in the Supreme Court — When issues were framed in trial Court counsel for both parties expressly stating that there was no other point in dispute and that the gave it up if a mention of it was made in the pleadings.

Held, under the circumstances it was too late to allow the point to be raised in the arguments before Supreme Court. *Wali Singh* v. *Sohan Singh*, **A I R 1954 S C 263.**

(1491) Practice — Plea not mentioned in grounds of appeal or in additional grounds — Claim made for the first time in Supreme Court at time of hearing — Held, not entertainable. *Bhupendra Narain* v. *Bahadur Singh*, **A I R 1952 S C 201.**

(1492) *Practice—Special leave to appeal — Criminal appeal — When granted — Supreme Court not to constitute itself third Court of facts.*

Generally speaking, Supremo Court will not grant special leave to appeal in criminal cases, unless it is shown that exceptional and special circumstances exist, that substantial and grave injustice has been done and that the case in question presents

features of sufficient gravity to warrant a review of the decision appealed against. Where the story for the prosecution for murder, which is neither incredible nor improbable, is supported by no less than 5 witnesses including the mother of the deceased, and their evidence, in spite of its infirmities, has impressed 4 assessors and the two Courts below, who, in appraising its reliability, have given due weight to certain broad features of the case which, according to them, negative the theory of conspiracy or concoction, it would be opposed to all principles and precedents if the Supreme Court were to constitute itself into a third Court of fact and, after re-weighing the evidence, come to a conclusion different from that arrived at by the trial Judge and the High Court. *Pritam Singh* v. *The State*, **A I R 1950 S C 169=1950 S C R 453.**

(1493) *Practice—Special leave to appeal — Decisions of Privy Council — Binding effect on question of granting special leave — Precedents.*

Though the Supreme Court is not bound to follow the decisions of the Privy Council too rigidly since the reasons, constitutional and administrative, which sometimes weighed with the Privy Council need not weigh with the Supreme Court, yet some of those principles are useful as furnishing in many cases a sound basis for invoking the discretion of the Court in granting special leave. *Pritam Singh* v. *The State*, **A I R 1950 S C 169=1950 S C R 453.**

SUPREME COURT RULES (1950)

(1494) *O. 4, R. 30 — Professional misconduct—Agreement by Advocate to share the result of litigation—(Bar Councils Act (1926), S. 12 (3)) — (Legal Practitioners (Fees) Act (1926), S. 3) — (Contract Act (1872), S. 23).*

An Advocate of the Supreme Court is bound to conduct himself in a manner befitting the high and honourable profession to whose privileges he has so long been admitted, and if he departs from the high standards which that profession has set for itself and demands of him in professional matters, he is liable to disciplinary action.

It is highly reprehensible for an Advocate to stipulate for, or receive, a remuneration proportioned to the results of litigation or a claim whether in the form of a share in the subject-matter, a percentage or otherwise.

He will, by so acting offend the rules of his profession and so render himself liable to the disciplinary jurisdiction of the Court. The rule applies to all Advocates, whether Barristers or otherwise. 3 Bom L R 102 and 61 Pun Re 1907 (FB), *Approved: Case Law Referred.*

Section 3 of the Legal Practitioners (Fees) Act, 1926, does not make any change in the above rule as that Act is not concerned with professional misconduct, which is dealt with by the Bar Councils Act. The latter Act makes no modification in the disciplinary jurisdiction of the High Court or of the sense in which professional misconduct had been understood throughout India up to that time.

G, an Advocate of the Supreme Court, entered into an agreement with his client which was embodied in his client's letter as under :

"I hereby engage you with regard to my claim against the Baroda Theatres Ltd., for a sum of Rs. 9400 (balance due to me).

Out of the recoveries you may take 50 per cent. of the amount recovered. I will by Wednesday deposit Rs. 200 in your account or give personally towards expens."

Held that a contract of this kind would be legally unobjectionable if no lawyer was involved. The rigid English rules of champerty and maintenance did not apply in India, so if this agreement had been between third parties, it would have been legally enforceable and good.

(2) that as G was an Advocate, such an engagement on his part amounted to professional misconduct calling for disciplinary action. *In the matter of 'G', A Senior Advocate S C,*

A I R 1954 S C 557
=1954 S C J 631.

(1495) *O. 40, R. 2—Taxation of party and party costs — Agent's remuneration fixed by agreement — (Civil P. C. (1908), S. 35) — (Contract Act (1872), Ss. 23, 24 and 31).*

Agreement between party and his agent fixing latter's remuneration — Question whether in taxing costs between party and party direction to opposite party should be to pay that agreed amount or taxed costs normally allowed is not covered by the Rules. Consequently the Rule of the Supreme

Court in England that a client, who has entered into an agreement with his agent or solicitor, fixing the amount or the manner of the latter's remuneration, is not entitled to recover from the opposite party anything in excess of that amount even though on taxation the costs might be much more, based upon the principle of English law that party and party costs are only on indemnity and consequently, the successful party will not be allowed to make any profit out of the order for costs made in his favour, should be applied.

Agreement to pay agent out of pocket expenses and fixed amount in any event and taxed costs if successful in the case. Obligation in latter part of agreement though contingent ripens into an absolute obligation when the case succeeds and the party is entitled to pay taxed costs to agent and claim indemnity from the opposite side. No question of law of Maintenance or Champerty arises when the agreement was not to relieve the party of the costs in the event of failure and where the agent was not to be paid out of the proceeds of litigation—Even if the agreement is considered void and unenforceable for some reason, the Court is not competent to disregard the latter part of the agreement and treat the first part as the entire contract but has to tax the cost between party and party as though no agreement between the party and agent exists—No question of relief being given on the ground of agreement being oppressive and unreasonable can arise in the case, as it can under O. 40, R. 46 in taxing costs between agent and client. *Firm of Peddana* v. *K. V. S. S. Sons,*

A I R 1954 S C 26.

TAXATION OF INCOME (INVESTIGATION COMMISSION) ACT (30 of 1947).

(1496) *S. 8 (5) — Remedy under — If the only remedy — Constitution of India, Art. 226.*

Quaere:—Whether S. 8 (5) of the Act is to be regarded as providing the only remedy available to the aggrieved party and exclude altogether the remedy provided for under Art. 226 of the Constitution? *K. S. Rashid* v. *I.-T. Commissioner,*

A I R 1954 S C 207=1954 S C R 738
= 1954 S C J 264.

TENANCY LAWS

AJMER TENANCY AND LAND RECORDS ACT (42 of 1950)

(1497) *S. 112 — Validity — (Constitution of India, Arts. 19 (1) (f) and (5) and 31-A).*

The law enacted in S. 112 is not saved either by Art. 19 (5) or by Art 31-A of the Constitution. It manifestly infringes the fundamental right of a landlord guaranteed by Art. 19 (1) (f) and is, therefore, void to that extent. *Raghubir Singh* v. *Court of Wards, Ajmer.*

A I R 1953 S C 373.

(1498) *S. 112 — Exercise of discretion under section—Suit to question discretion — (Ajmer Government Wards Regulation (1 of 1888), Ss. 6 and 27).*

The result of the combined operation of S. 112 of Act 42 of 1950 and of the provisions of Regulation I of 1888 is that the Court of Wards can in its own discretion and on its subjective determination, assume the superintendence of the property of a landlord who habitually infringes the rights of his tenants. The exercise of this discretion cannot be questioned in any manner in a Civil Court. *Raghubir Singh* v. *Court of wards Ajmer,* **A I R 1953 S C 373.**

(1499) *Bombay Talukdari Tenure Abolition Act (62 of 1949), S. 1—Validity of Act — Challenge on ground of violation of S. 299, Government of India Act — (Government of India Act (1935), S. 299)—(Constitution of India, Art. 31-B).*

The protection under Art. 31-B is not merely against the contravention of certain provisions but an attack on the ground of unconstitutional abridgement of certain rights. It will be illogical to construe Art. 31-B as affording protection only so far as these rights are taken away by an Act in violation of the provisions of the new Constitution but not when they are taken away by an Act in violation of S. 299 of the Government of India Act which has been repealed. The intention of the Constitution to protect each and every one of the Acts specified in the Ninth Schedule of the Constitution from any challenge on the ground of violation of any of the fundamental rights secured under Part III of the Constitution irrespective of whether they are pre-existing or new rights, is placed beyond any doubt or question by the very emphatic language of Art. 31-B. Hence, the validity of the Bombay Talukdari Tenure Abolition Act, which is specified in the Ninth Schedule, cannot be challenged on the ground of violation of the provisions of S. 299 of the Government of India Act. *Dhirubha Devsingh* v. *State of Bombay,* **A I R 1955 S C 47.**

MADHYA PRADESH ABOLITION OF PROPRIETARY RIGHTS (ESTATES, MAHALS, ALIENATED LANDS) ACT (1 of 1951)

(1500) *Validity.*

The Act is valid. A I R 1952 S C 252, *Foll. Firm C. J. Patel & Co.* v. *M. P. State,* **A I R 1953 S C 108.**

(1501) *S. 1 — Object of Act — Public purpose behind Act — (Constitution of India, Art. 31 (2)).*

The purpose behind the Act is to establish direct contact between tillers of the soil and the Government and to eliminate the intermediaries, as in the view of the Government this is for the welfare of the society as a whole. It is also the purpose of the act to confer 'Malik Maqbuza' status on occupancy tenants and improve their present position and to vest management of village affairs and cultivation in a democratic village body. It is too late in the day to contend that reform in this direction is is not for general public benefit. *State of Bihar* v. *Sir Kameshwar Singh.*

A I R 1952 S 252 =1952 S C R 889=1952 S C J 354.

(1502) *Ss. 3, 4, 6—Proprietary Right.*

Contracts and agreements entered into by persons with the previous proprietors of certain estates and mahals in the State under which they acquired the rights to pluck, collect and carry away tendu leaves, to cultivate, culture and acquire lac, and to cut and carry away teak and timber and miscellaneous species of trees called hardwood and bamboos—Several of the contracts and agreements were before the date of vesting and many of them were even prior to 16-3-1950 — The contracts and agreements are in essence and effect licenses granted to the persons to cut, gather and carry away the produce in the shape of tendu leaves, or lac, or timber, or wood—The rights of the petitioners either as buyers or lesses or licensees are not encumbrances within S. 3 — The State has no right to interfere with the rights of the several petitioners under the contracts and agreements in their favour: A I R 1949 P C

Tenancy Laws — M. P. Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act (1951)

Tenancy Laws—Madras Estates Land Act (1908)

311, *Rel. on. Firm C. J. Patel & Co.* v. *M. P. State,* A I R 1953 S C 108.

(1503) *S. 9 — Delegation of power to determine how compensation should be paid—Compentency.*

The legislature has applied its mind to the form in which compensation has to be paid and has fixed the number of equal instalments in which it should be paid. It has also provided for payment of interest on the compensation amount in the meantime. The proportion in which the compensation could be paid in cash and in bonds and the intervals between the instalments have been left to be determined by the executive Government as those must necessarily depend on the financial resources of the State and, the availability of funds in regard to which the Executive Government alone can have special means of knowledge. By no standard of permissible delegation can the vesting of such limited discretion by a legislature in an administrative body be held incompetent. *State of Bihar* v. *Sir Kameshwar Singh,*

A I R 1952 S C 252
=1952 S C R 889=1952 S C J 354.

MADRAS ESTATES LAND ACT (1 OF 1908)

(1504) *S. 3 (2) (d), Explanation I (as amended by Madras Act 18 of 1936)—"Any Inam village"—Meaning of.*

"Any inam village" in S. 3 (2) (d) means a whole village granted in inam and not anything less than a village however big a part it may be of that village. *Dist. Board Tanjore* v. *M. K. Noor Mohammad,*

A I R 1953 S C 446.

(1505) *S. 3 (2) (d), Explanation I (as amended by Madras Act 18 of 1936)—"Other tenure"—Expression should be construed 'ejusdem generis' with service tenure.*

Per *Mahajan J., (Chandrasekhara Aiyar J. contra)* : The expression "other tenure" in the Explanation should ordinarily be construed 'ejusdem generis' with a service tenure owing to the reason that these service tenures usually are resumable and in case of reasonable tenures the reversionary right in the land remains in the grantee and therefore even if such resumable tenures are excluded from the grant, in substance

Tenancy Laws—Madras Estates Land Act (1908)

the grant can be deemed to be of the whole village. The same can be said of lands reserved for communal purposes. *Dist. Board, Tanjore* v. *M. K. Noor Mohammad,*

A I R 1953 S C 446.

(1506) *S. 3 (a)(d) (as amended by Madras Act 18 of 1936) — Burden of proof.*

The burden of proving that certain lands constitute an "estate is upon the party who sets up the contention. *District Board Tanjore* v. *M. K. Noor Mohammad.*

A I R 1953 S C 445.

(1507) *S. 3 (2) (d), Explanation 1 (as amended by Madras Act 18 of 1936)—Two blocks of land held by two persons under two grants—Inference.*

In order to come within the scope of the definition of "estate" a grant of a named village must fulfil the following conditions: (a) the words of the grant should expressly (and not by implication) make it a grant of a particular village as such by name and not a grant of a defined specific area only; and (b) that the area excluded had already been granted for service or other tenure; or (c) that it had been reserved for communal purposes.

Where in a village two blocks of land were held under two separate grants by two different persons and they were recognised under two separate title deeds by the British Government:

Held that from this meagre material it was not possible to conclude that the first grant was either of the whole village area or was expressed to be of a named village and that the area excluded had already been granted for service or other tenure. *Dist. Board Tajore* v. *M. K. Noor Mohammad,* A I R 1953 S C 446.

(1508) *Ss. 168A and 177 (2) (as amended by Orissa Act, 19 of 1947)—Validity —(Constitution of India, Arts. 245, 246).*

The amendments in the Madras Estates Land Act are no part of the Estates Abolition Act of Orissa and there is no question of any colourable exercise of legislative powers in regard to the enactment of these provisions. *K. C. G. Narayan Deo* v. *State of Orissa,* A I R 1953 S C 375 = 1954 S C R 1 = 1953 S C J 592.

(1509) *Ss. 168A and 177 (2) (as amended by Orissa Act 19 of 1947)—Validity.*

(Quære) : Whether by the amended Sections there has been an improper delegation

Tenancy Laws—Orissa Estates Abolition Act (1952)

of legislative powers by the legislature to the Provincial Government, and whether these provisions offend against the equal protection clause embodied in Art. 14 of the Constitution. *K. C. G. Narayan Deo* v. *State of Orissa*, **A I R 1953 S C 375 = 1954 S C R 1 = 1953 S C J 592.**

ORISSA ESTATES ABOLITION ACT, 1951 (1 of 1952).

(1510) *S. 2 (h)* —"*Sanad, deed and other instrument.*"

Mahajan and Bose JJ. : The words the "deed and other instrument" in S. 2 (h) are not ejusdem generis with "Sanad" and are not confined to a document of title like a Sanad in which one party creates or confers a Zamindari estate on another. The words must be read disjunctively and be interpreted according to their ordinary meaning. For example, a document by an intermediary acknowledging the overlordship of another would fall within the definition. *Biswambhar Singh* v. *State of Orissa*, **A I R 1954 S C 139 = 1954 S C R 842 = 1954 S C J 219.**

(1511) *S. 2 (h)*—"*Within the meaning of*"—*(Words and Phrases).*

The words "within the meaning of" in S. 2 (h) cannot mean that if A is mentioned in one of those documents (viz., Waji-bularz or any Sanad, deed or other instrument) and is called or referred to as a zamindar that makes him an intermediary, for if that had been the intention, the definition would have said so. The words have been inserted to include only those documents which deal, or purport to deal, with true intermediaries, that is to say, with persons who hold an interest in the land between the raiyat or actual cultivator and the overlord of the demesne.

(Point illustrated).

Accordingly the kind of zamindar referred to in S. 2 (h) is one who is, what may be called a "true intermediary" within the meaning of the four documents set out there, that is to say, persons who hold an interest in the land between the raiyat and the overlord of the estate. *Biswambhar Singh* v. *State of Orissa*, **A I R 1954 S C 139 =1954 S C R 842 =1954 S C J 219.**

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(1512) *Ss. 2 (h), 2 (g) and 3* — "*Intermediary*" *and* "*Estate.*"

Before any property can be taken over under the Act, it must be an "estate" within the meaning of the above definition and so must belong to an "intermediary" as defined in clause (h).

In order to be an "intermediary" within the definition it is not enough if the person is a Zamindar, Illaqedar, or Jagirdar simpliciter but he must fall within one or other of the categories "within the meaning of the Wajibularz or any Sanad, deed or other instrument."

Owners of Hemgir and Saraphgarh property within the former State of Gangpur, now merged in the State of Orissa are not intermediaries as defined in S. 2 (h) and their properties namely Hemgir and Saraphgarh are not 'estates' within the meaning of S. 2 (g) and that being so the State Government had no jurisdiction or authority to issue any notification under S. 3 with respect to their properties.

Per *Patanjali Sastri C. J., Das and Ghulam Hasan JJ. (Mahajan and Bose JJ. contra)* — The proprietor of the Nagra Zamindari estate (within the former State of Gangpur, now merged in the State of Orissa) held under the Ekrarnama on the terms of payment of a fixed annual rent to the Raja of Gangpur since 1879, was Zamindar within the meaning of the Ekrarnama. In this view of the matter, the proprietor is an "intermediary" as defined in S. 2 (h) of the Act and his estate is an "estate" within the meaning of S. 2 (g), and consequently the State Government had ample jurisdiction or authority to issue a notification under S. 3 of the Act.

The forest lands were included within the estate held by the Zamindar of Nagra under the Raja of Gangpur and fall within the ambit of estate as defined in S. 2 (g).

Per *Mahajan and Bose JJ. (Dissenting)* —In the absence of the document (Ekrarnama) itself, it would not be right to infere that the Zamindar of Nagra had suddenly surrendered the claims to municipal independence which he had been contesting for years and which he had continued to contest to the present day. The Zamindar agreed to pay the Raja a fixed yearly sum of Rs. 700 as "rent" while the Raja agreed that the Nagra Zamindar should police his

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own estate and agreed that he, the Raja, would not grant any more pattas to the Gaontias in that area; also that the Raja would not collect taxes from the Kumbars etc., but would instead settle separately with the Zamindar after first submitting his report about this to the Commissioner. The fact that the word "rent" was used instead of "tribute" lost all its force in view of the fact that the Diwan of the Gangpur State writing to the Zamindar of Nagra himself called it Takoli in a letter dated 29-3-1943. The rights of the Zamindar regarding Gaontias and the policing of his own tracts were conceded. The right to police a tract of land is one of the first attributes of sovereignty. Read as a whole, this settlement supported the Zamindar's claims rather than negative them. If the original word was "takoli", it was as consistent with tribute as with revenue, especially when we read it along with the concessions made by Gangpur about the police powers and the Gaontias, Takoli was a term which had no fixed meaning and was what the Zamindars of Hemgir and Sarapgarh also paid the Raja of Gangpur. The only difference in their cases was that their Takoli could be enhanced from time to time whereas that of Nagra could not; that placed Nagra in a much stronger position than the other two and so, far from showing municipal subordination to Gangpur, indicated the contrary particularly when read in conjunction with the police powers which Nagra retained in defence of Gangpur's claim. Accordingly, it could not be concluded on the basis of the imperfect secondary evidence that the meaning of Ekrarnama was to define the Zamindar's status as that of a "true intermediary."

Therefore Nagra is also not an "estate" within the meaning of S. 2 (h). *Biswambhar Singh* v. *State of Orissa*,

A I R 1954 S C 139
=1954 S C R 842
=1954 S C J 219.

(1513) *S. 3—Section is not discriminatary—(Constitution of India, Art. 14).*

Patanjali Sastri C.J., Das and Ghulam Hassan JJ.—The long title of the Act and the two preambles clearly indicate that the object and purpose of the Act is to abolish all the rights, title and interest in land of Intermediaries by whatever name known. This is a clear enunciation of the policy

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which is sought to be implemented by the operative provisions of the Act. Whatever discretion has been vested in the State Government under S. 3 or S. 4 must be exercised in the light of this policy and, therefore, it cannot be said to be an absolute or unfettered discretion, for sooner or later all estates must perforce be abolished. From the very nature of things a certain amount of discretionary latitude had to be given to the State Government. It would have been a colossal task if the State Government had to take over all the estates at one and the same time. It was therefore, imperative to confer some discretion on the State Government. If any notification or order is made, not in furtherance of the policy of the Act but in bad faith and as and by way of discrimination such notification or order, which by virtue of Art. 13 (3) comes within the definition of "Law", will itself be void under Art. 13 (2).

Section 3, therefore, is not discriminatory because it gives discretion to the State to choose their time for purposes of carrying out the objective and the policy laid down in the preamble. *Biswambhar Singh* v. *State of Orissa*,

A I R 1954 S C 139
=1954 S C R 842
=1954 S C J 219.

(1514) *S. 5—Validity—(Constitution of India, Art. 31).*

Assuming that in India there is no absolute rule of law, that whatever is affixed to or built on the soil becomes a part of it and is subject to the same right of property as the soil itself, there is nothing in law which prevents the State legislature from providing as a part of the Estates abolition scheme that buildings, lying within the ambit of an estate and used primarily for management or administration of the estate, would vest in the Government as appurtenances to the estate itself. This is merely ancillary to the acquisition of an estate and forms an integral part of the abolition scheme. Such acquisition would come within Art. 31 (2) of the Constitution. Compensation has been provided for these buildings in S. 26 (2) (iii) of the Act and the annual rent of these buildings determined in the prescribed manner constitutes one of the elements for computation of the gross asset of an estate. Even if the compensation provided for the acquisition of the buildings

Tenancy Laws—U. P. Zamindari Abolition and Land Reforms Act (1951) is not just and proper, the provision of Art. 31 (4) of the Constitution would be a complete answer to such accusation. *K.C.G. Narayan Deo* v. *State of Orissa*,

A I R 1953 S C 375
=1954 S C R 1=1953 S C J 592.

(1515) *S. 5—Validity—(Constitution of India, Art. 31).*

It cannot be said that the compensation for the private lands in possession of temporary tenants has been given only for the landlord's interest in these properties and nothing has been given in lieu of the tenant's interest. The entire interest of the proprietor in these lands has been acquired and the compensation payable for the whole interest has been assessed on the basis of the net income of the property as represented by the share of the produce payable by the temporary tenants to the landlord. All the requirements of Art. 31 (4) have been complied with and consequently there is no room for any obiection to the legislation on the ground that the compensation provided by it is inadequate though the original Estates Abolition Bill, which was pending before the Orissa Legislature at the time when the Constitution came into force, did not contain any provision that the private lands of the proprietor in occupation of temporary tenants would also vest in the State. This provision was subsequently introduced by way of amendment during the progress of the Bill and after the Constitution came into force. A I R 1952 S C 252, *Foll. K. C. G. Narayan Deo* v. *State of Orissa*,

A I R 1953 S C 375=1954 S C R 1
=1953 S C J 592.

U. P. ZAMINDARI ABOLITION AND LAND REFORMS ACT, 1950 (1 of 1951).

(1516) *Ss. 6 (e), (g) and 68 — Delegation is within permissible limits and is not delegation of essential legislative power — (Constitution of India, Art. 245.)*

(Mahajan J.) — Sections 6 (e) and (g) and 68 provide for the prescription of the rate of interest by the Executive Government on mortgages and they also authorize the Local Government to determine the period of redemption of the bonds and the fixation of the ratio between payment of compensation in bonds and payment in cash. The delegation is within the permissible limits and does not amount to delegation of essential legislative power because main principles on these matters have been laid down in the Act and matters of detail have been left to the rule-making power. *State of Bihar* v. *Sir Kameshwar Singh*,

A I R 1952 S C 252
=1952 S C R 889
=1952 S C J 354.

(1517) Act not void—Notification of consequential nature issued by executive under it cannot be bad : *State of Bihar* v. *Sir Kameshwar Singh*,

A I R 1952 S C 252
=1952 S C R 889
=1952 S C J 354.

(1518) *Act cannot be challenged on ground of lack of public purpose and provision for compensation — (Constitution of India, Arts. 31 (2) and (4).*

Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 (U. P. Act No. 1 of 1951) is protected under Art. 31 (4) from attack in any court on the ground that it contravenes the provisions of Article 31 (2). The objections based on the lack of a public purpose and the failure to provide for payment of just compensation are also devoid of merits. *State of Bihar* v. *Sir Kameshwar Singh*,

A I R 1952 S C 252
=1952 S C R 889
=1952 S C J 354.

(1519) *Acquisition of property dedicated for charitable purposes for public purposes (Constitution of India, Art. 31 (2).*

(Per *Mahajan J.*)—A charity created by a private individual is not immune from the sovereign's power to compulsorily acquire that property for public purposes, it is incorrect to say that the vesting of these properties in the State under the provisions of that Act in any way affects the charity adversely because the net income that the institutions are deriving from the properties has been made the basis of compensation awarded to them. *State of Bihar* v. *Sir Kameshwar Singh*,

A I R 1952 S C 252
=1952 S C R 889
=1952 S C J 354.

(1520) *Hereditary Rights in land granted to taluqdars affected — Act is not void on that ground — (Constitution of India, Art. 245).*

Tenancy Laws — U. P. Zamindari Abolition and Land Reforms Act (1951)

(Per *Mahajan J.*) — The Crown cannot deprive a legislature of its legislative authority by the mere fact that in the exercise of its prerogative it makes a grant of land within the territory over which such legislative authority exists and no Court can annul the enactment of a legislative body acting within the legitimate scope of its sovereign competence. If, therefore, it be found that the subject-matter of a Crown grant is within the competence of a provincial legislature nothing can prevent that legislature from legislating about it, unless the constitution Act itself expressly prohibits legislation on the subject either absolutely or conditionally. The fact that the U. P. Act 1 of 1951 affects the hereditary rights of the taluqdars in Oudh in the lands granted under sanad by British Government does not make the Act invalid. *State of Bihar* v. *Sir Kameshwar Singh*,

A I R 1952 S C 252
=1952 S C R 889
=1952 S C J 354.

(1521) Actual amount of compensation to be determined by Compensation Officer— Provision for appeal against the adjudication — It cannot be said that State is a judge in its own cause — It is an Act of legislature and within its competence — No challenge can be made against validity of Act on this ground — Per *Mahajan J.*— (Constitution of India, Art. 245). *State of Bihar* v. *Sir Kameshwar Singh*,

A I R 1952 S C 252
=1952 S C R 889
=1952 S C J 354.

(1522) *Provisions as to compensation are not illusory — (Constitution of India, List III, Entry 42).*

(Per *Mahajan J.*)—Though the principles of payment of compensation stated in the Act do not give anything like an equivalent or *quid pro quo* for the property acquired and provide only for payment of what is euphemistically described in the resolution of the U. P. Legislature as "equitable compensation," the conclusion cannot be drawn that the provisions as to compensation in the Act are illusory.

It cannot be said that the provisions of the Act would result in non-payment of compensation. Properties comprised in an estate may be income-fetching and non income fetching, the value of these to the owner in the market may well be on the basis of income and if the Act has laid down the principle of payment of compensation on the foot of net income, it cannot be said that the legislation is outside the ambit of Entry 42 of List III. (Patanjali Sastri C. J.: Para. 20; Das J.: Para. 229). *State of Bihar* v. *Sir Kamleshwar Singh*,

A I R 1952 S C 252
=1952 S C R 889
=1952 S C J 354.

(1523) Religious endowments Act does not stand in the way of acquisition of religious endowment : Per *Mahajan and Das JJ.* — (Religious endowment Act (20 of 1863). *State of Bihar* v. *Sir Kamleshwar Singh*,

A I R 1952 S C 252
=1952 S C R 889
=1952 S C J 354.

TRADE MARKS ACT (1940)

(1524) *S. 8 — Burden of proof —(Evidence Act (1872), Ss. 101 to 103).*

The burden of proving that the trade mark which a person seeks to register is not likely to deceive or to cause confusion is upon the applicant. It is for him to satisfy the Registrar that his trade mark does not fall within the prohibition of S. 8 and therefore it should be registered. *N. S. Thread and Co.* v. *James Chadwick and Brothers*,

A I R 1953 S C 357.

(1525) *S. 8 — Passing off action and registration of trade mark — Different considerations — (Civil P. C. (1908), S. 11).*

The onus in a passing of action rests on the plaintiff to prove whether there is likelihood of the defendants' goods being passed off as the goods of the plaintiffs. The considerations relevant in a passing off action are somewhat different than they are on an application made by registration of a mark under the Trade Marks Act and that being so the decision of a Court in a passing off action cannot be considered as relevant on the questions that the Registrar has to decide under the provisions of S 8. *N. S. Thread and Co.* v. *James Chadwick and Brothers*, A I R 1953 S C 357.

(1526) *S. 8 — 'Likely to deceive or to cause confusion."*

Under S. 8 an application made to register a trade mark which is likely to deceive or to cause confusion has to be refused notwithstanding the fact that, the mark might

have no identity or close resemblance with any other trade mark. The Registrar has to come to a conclusion on this point independently of making any comparison of the mark with any other registered trade mark. What the Registrar has to see is whether looking at the circumstances of the case particular trade mark is likely to deceive or to cause confusion. In deciding that the duty is not discharged by arriving at the result by merely comparing it with the trade mark which is already registered and whose proprietor is offering opposition to the registration of the mark. The real question to decide in such cases is to see as to how a purchaser, who must be looked upon as an average man of ordinary intelligence, would react to a particular trade mark, what association he would form by looking at the trade mark, and in what respect he would connect the trade mark with the goods which he would be purchasing :

Held that camouflaging an Eagle into a vulture by calling it such was likely to cause confusion especially when it did not represent a vulture or look like a vulture of any form or shape : A I R 1951 Bom 147, *Affirmed. N. S. Thread and Co.* v. *James Chadwick and Brothers,*

A I R 1953 S C 357.

(1527) *S. 76 — Appellate jurisdiction given by S. 76.*

The rights created by the Trade Marks Act are civil rights for the protection of persons carrying on trade under marks which have acquired reputation. The statute creates the Registrar a tribunal for safeguarding these rights and for giving effect to the rights created ay the Act, and the High Court as such without more has been given appellate jurisdiction over the decisions of this tribunal. The High Court while exercising this appellate jurisdiction has not to exercise it in a manner different from its other appellate jurisdiction. It is merely an addition of a new subject-matter of appeal to the appellate jurisdiction already exercised by the High Court : I L R (1946) 2 Cal 359; A I R 1947 Cal 49; 51 Cal W N 42, *Overruled. N. S. Thread and Co.* v. *James Chadwick and Brothers,*

A I R 1953 S C 357.

(1528) *S. 77 — S. 77 does not negative applicability of Letters Patent.*

There is nothing in the provisions of S. 77 which debars the High Court from hearing

appeals under S. 76 according to the rules under which all other appeals are heard or from framing rules for the exercise of that jurisdiction under S. 108, Government of India Act, 1915, for hearing those appeals by single Judges or by Division Benches. Even if S. 77 had not been enacted it cannot be said that the High Court will then have no power to make rules for the hearing of appeals under S 76 : I L R (1946) 2 Cal 359 : A I R 1947 Cal 49 : 51 Cal W N 42, *Overruled. N. S. Thread and Co.* v. *James Chadwick and Brothers,*

A I R 1953 S C 357.

TRANSFER OF PROPERTY ACT (1882)

(1529) *S. 1 — Applicability of principles of Act to cases excluded therefrom.*

The Courts should be very careful in applying statutory provisions and the assistance of the Transfer of Property Act as a guide on matters which have been excluded from the purview of the Act by express words should not be invoked, unless the provisions of the Act embody principles of general application : A I R 1919 Mad 12 *Approved. Nam Deo* v. *Narmadabai,*

A I R 1953 S C 228.

(1530) S. 3 — Attested — Document attested on same day as it was written but before it was executed, i. e., signed by the party — Attestaiion not valid. *Sant Lal* v. *Kamla Prasad,* **A I R 1951 S C 477 =1951 S C J 768 =1952 S C R 116.**

(1531) *S. 3 (d) — Merger — Lessee acquiring share in leased property — Estate subject to lakhraj & Mokarrari interests — Acquisition by Mokarraridar of portion of Lakhraj interest.*

On lessor purchasing lessee's interest, the lease is extinguished but the same is not true if one of the several lessees purchases only a part of the lessor's interest. Hence, in the case of an estate which is subject to Lakhraj & Mokarrari interest, mere purchase by one of the several joint holders of the mokarrari interest, of protions of the Lakhraj interest does not result in an extinction of the lease or break its integrity. The mokarrari interest of the purchaser therefore does not merge in his lakhraj interest. *Badri Narayan* v. *Rameshwar Dayal,* **A I R 1951 S C 186.**

(1532) *S. 8 — Hindu Law — Grant in favour of limited owner — (Succession Act (1925), S. 95).*

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The general principle of law which is well recognised & is embodied in S. 8, T. P. Act is that if an estate were given to a man without express words of inheritance, it would, in the absence of a conflicting context, carry, by Hindu Law an estate of inheritance and unless it is shown that under Hindu Law a gift to a female means a limited gift or carries with it the restrictions or disabilities similar to those that exist in a 'widow's estate' there is no justification for departing from this principle. There is certainly no such provision in Hindu Law and no text could be supplied in support of the same. The position, therefore, is that to convey an absolute estate to a Hindu female, no express power of alienation need to be given; it is enough if words are used of such amplitude as would convey full rights of ownership.

It seems clear that the intention of the testator was to benefit his daughter Laxmi and to confer upon her the same title as he himself possessed. She was the sole object of his bounty and on the attendant circumstances of this case it was plain that he intended to confer on her whatever title he himself had. Laxmi therefore, became the absolute owner of the property under the terms of the oral will of her father and the plaintiff who was her sister's son was no heir to the property which under the law devolved on Laxmi's husband who had full right to alienate it. *Nathu Lal* v. *Durga Prasad*, **A I R 1954 S C 355 = 1954 S C J 557.**

(1533) *S. 41 — Transferee from limited owner — Section 41 does not protect transferees against claim of reversioners.*

In cases where a person who has allowed another to occupy the position of an ostensille owner has a limited estate the rule of Section 41 applies only during the lifetime of the limited owner and is not available to protect transferees against the claim of the reversioners. *Phool Kuer* v. *Prem Kuer*, **A I R 1952 S C 207 = 1952 S C J 296.**

(1534) *S. 53-A — Applicability.*

The person claiming under the transferor referred to in S. 53-A is a person who claims under a title derived subsequently to the date of the transfer and not anterior to the said date. The proviso to the section saves the right of a transferee for consideration who has no notice of the contract of which there was part performance, that

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is to say, any rights which the transferee under the unregistered document may have on the strength of part performance of the contract against the transferor would not be of any avail against a bona fide transferee for value from the transferor who had no notice of the transaction. Where, therefore, the plaintiff claimed possession of property under a good and genuine contract of sale earlier in date to the defendant's contract, and the defendant was not a transferee for value who had paid money in good faith but all that he had got was a contract of sale but not a sale, and the High Court had found further that he took his contract with the knowledge of the plaintiffs earlier title, S. 53 A had no application. *Hem Raj* v. *Rustomji*, **A I R 1953 S C 503.**

(1535) *S. 53-A — Plea under* : A. I. R. 1944 Bom. 105, *Reversed.*

Where in an action to eject a lessee on the ground that he had no registered deed of lease executed in his favour the defendant lessee takes the plea of part performance and proves that there was a written and signed contract of lease in his favour and that he had taken possession in accordance with the terms of the agreement and had built a factory on the land and also that he was paying rent to the plaintiffs in accordance with that agreement the defendant is entitled to retain possession in spite of an absence of the registered deed: A. I. R. 1944 Bom. 105, *Reversed. Manek Lal* v. *H. J. Ginwalla & Sons*, **A I R 1950 S C 1 = 1950 S C R 75 = 1950 S C J 317.**

(1536) *S. 53A—Applicability — Agreement of lease.*

A formal lease is not necessary to attract the application of S. 53A. All that is required is that an agreement in writing signed by the transferor can be gathered from the evidence. *Manek Lal* v. *H. J. Ginwalla & Sons*, **A I R 1950 S C 1 =1950 S C R 75=1950 S C J 317.**

(1537) *S. 54 — Contract of sale completed - Subsequent dispute as to clause in sale deed—Its effect on contract.*

A dispute arising subsequent to the contract for sale of property about a particular clause in the deed during the negotiations about the form the deed should take cannot affect the completeness of the contract already made, nor can it amount to repudia-

tion when it is not persisted in and the vendee later expresses his readiness and willingness to perform the contract "agreed to." *Durga Parsad* v. *Deep Chand*,

A I R 1954 S C 75.

(1533) *S. 55 (2) — Form of warranty in sale deed—Its effect on contract of sale (Specific Relief Act (1877), S. 23).*

Vendees' insistence on the form of warranty to be inserted in the sale deed subsequent to the contract for sale cannot affect the contract. It might in a given case disentitle him to specific performance, but that would depend upon whether his proposal regarding a form of warranty to which, he was not entitled was a mere proposal regarding the form of the sale or was a refusal to perform without it. 9 All 705 (P C), *Ref. Durga Parsad* v. *Deep Chand*,

A I R 1954 S C 75.

(1539) *S. 58 (c) — Mortgage by conditional sale or sale with a condition of repurchase.*

The question whether a given transaction is a mortgage by conditional sale or a sale outright with a condition of repurchase is a vexed one and must be decided on its own facts. In such cases the intention of the parties is the determining factor. 22 All 149 (PC), *Ref. to.*

The rule of law on this subject is one dictated by commonsense; that prima facie an absolute conveyance, containing nothing to show that the relation of debtor and creditor is to exist between the parties, does not cease to be an absolute conveyance and become a mortgage merely because the vendor stipulates that he shall have a right to repurchase. In every such case the question is, what upon a fair construction, is the meaning of the instruments? (1858) 44 E R 924, *Rel. on.* 12 All 387 (PC) and A I R 1916 PC 49, *Ref. to.*

The converse also holds good and if, on the face of it, an instrument clearly purports to be a mortgage it cannot be turned into a sale by reference to a host of extraneous and irrelevant considerations. Difficulty only arises in the border line cases where there is ambiguity.

Under the Proviso to S. 58 (c), T P. Act, if the sale and agreement to repurchase are embodied in separate documents, then the transaction cannot be a mortgage whether the documents are contemporaneously executed or not. But the converse does not hold good, that is to say, the mere fact that there

is only one document does not necessarily mean that it must be a mortgage and cannot be a sale. If the condition of repurchase is embodied in the document that effects or purports to effect the sale, then it is a matter for construction which was meant. The legislature has made a clear cut classification and excluded transactions embodied in more than one document from the category of mortgages, therefore, it is reasonable to suppose that persons who, after the amendment choose not to use two documents, do not intend the transaction to be a sale, unless they displace that presumption by clear and express words; and if the conditions of S. 58 (c) are fulfilled, then the deed should be construed as a mortgage.

The document in suit, omitting the unnecessary words and portions was to the following effect: "Rs. 634 principal with interest under a registered rehan bond" (simple mortgage) "dated the 6th May 1927 is justly due . . . by us the executants. Now we further require Rs. 65-6-0 more to meet costs of the suit under S. 40". (Bihar Tenancy Act) . . . "and at present there is no other way in view rather it seems impossible and difficult to arrange for the money without selling the property let out in rahan" (simple mortgage) "under the above mentioned bond". "Therefore, we the executants . . . declare . . . that we . . . sold and vended the properties detailed below on condition (given below) for fair and just price of Rs. 700 . . . ." "That we set off Rs. 634-10-0 against the consideration money . . . . payable under the aforesaid bond in favour of the said vendee and received Rs. 65-6 0 in cash from the said vendee. In this way the entire consideration money was realised from the said vendee." And we put the said vendee in possession and occupation of the vended property detailed below and made him an absolute proprietor in our places. "If we, the executants, shall repay the consideration money to the said vendee within two years . . . . . the property vended under this deed of conditional sale attached shall come in the exclusive possession and occupation of us, the executants." "If we do not pay the same, the said vendee shall remain in possession and occupation thereof generation after generation, and he shall appropriate the produce thereof" "We, the executants, neither have nor shall have any objection whatsoever in respect of the vended property and the consideration money. Per-

chance if we do so it shall be deemed null and void in the Court." "And we declare also that the vended property is flawless in every way and that if in future any kind of defect whatsoever be found on account of which the said vendee be dispossessed of a portion or the entire property vended under this deed of conditional sale and will have to pay the loss or damage, in that event we, the executants (a) shall be liable to be prosecuted under the criminal procedure, and (b) we shall pay the entire consideration money together with loss and damage and interest at the rate of Rs. 2 per mensem per hundered rupees from the date of the execution of this deed till the date of realisation from out person and other properties (c) and we shall not claim the produce of the vended property for the period of vendee's possession against the said vendee or his heirs and representative." "Therefore, we, the executants have executed this deed of conditional sale so that it may be of use in future."

Held on construction of the document and taking everything into consideration that the deed was a mortgage by conditional sale under S. 53 (c), T. P. Act. *Chunchun Jha* v. *Ebadat Ali*,

A I R 1954 S C 345.

(1540) *S. 60 — Trusts Act (1882), S. 90 — Sale of tenancy in execution of decree for rent — Purchase by mortgagee in possession — Right of tenant to redeem — (Tenancy Laws — Bihar and Orissa Tenancy Act (2 of 1913), S. 225).*

A, a tenant under the Orissa Tenancy Act, mortgaged his lands with B under a simple mortgage. The land was put up for sale in execution of the landlord's decree for arrears of rent and B, on paying up the amount, obtained possession under S. 225 of the Orissa Tenancy Act. The land was again sold in execution of a decree for arrears of rent and was purchased by mortgagee B. Possession was also delivered to B, though B had been in actual physical possession. A sued for possession or in the alternative redemption of the land, contending that B held the land as a trustee for A and was bound to return the same on being reimbursed for whatever he had spent over it.

Held (i) that in the absence of any special statutory provision to the contrary the case was governed by S. 90, Trusts Act.

(ii) that B was a mortgagee & apart from special statutes, the only way in which a mortgage could be terminated as between the parties to it was by the act of the parties themselves, by merger or by an order of the Court. The maxim "once a mortgage always a mortgage" applied. Therefore, when B entered upon possession he was there as a mortgagee and being a mortgagee A had a right to redeem unless there was either a contract between the parties or a merger or a special statute to debar him.

(iii) That on obtaining possession under S. 225, Orissa Tenancy Act, B became a statutory mortgagee and was still liable to redemption. B's rights as a mortgagee were however preserved to him under S. 225 (2).

(iv) that when B purchased under the second sale he did not thereby destroy A's right to redeem because he was at that time standing in A's shoes as a mortgagee in possession under S. 225 (1) and his purchase so far as title was concerned had exactly the same effect as if A himself had purchased the property.

(v) that there was equally no question of extinction by merger of a lower estate in a higher because what B purchased was the tenant's estate and not the landlord's. A was therefore entitled to a decree for redemption. *Sidhakamal Nayan* v. *Bira Naik*,

A I R 1954 S C 336.

(1541) *S. 65A — Mortgagor's power to lease prior to enactment of S. 65A — Permanent lease granted—Burden of proof — Binding effect of lease on mortgagee.*

Under the law as it stood prior to the enactment of S. 65A, the question whether the

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mortgagor in possession has power to lease the mortgaged property has got to be determined with reference to the authority of the mortgagor as the bailiff or agent for the mortgagee to deal with the property in the usual course of management. It has to be determined on general principles and no ton the distinction between an English mortgago and a simple mortgage or on con siderations germane to S. 66.

So considered, a mortgagor in possession may grant a lease conformable to usage in the ordinary course of management but is not competent to grant a lease on unusual terms or authorise to use of land in a manner or for a purpose different from the mode in which he himself had used it before he granted the mortgage. Consequently, if the mortgagor, after he has granted the mortgage, deals with the property in the usual course of management, the interest created by him may be rightly deemed operative against the mortgagee : A. I. R. 1917 Cal. 222, *Approved*; 10 W. R. 325 (Cal.), *Expl.*; A. I. R. 1916 Cal. 870, *Not Approved*.

In order that it may be so operative, it is for the lessee if he wants to resist the claim of the mortgagee to establish that the lease in his favour was granted on the usual terms in the ordinary course of management. Such a plea if established, the burden of proving which is upon him, furnishes a complete answer to the claim of the mortgagee. If the lessee fails to establish this position he has no defence to an action at the instance of the mortgagee that the lease is not binding upon him.

(*Note.*—In this case there was no allegation on behalf of the lessee that the grant of the permanent lease was a dealing with the mortgaged property in the usual course of management by the mortgagor. It was held that in the absence of any such plea the permanent lease could not prevail

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against the mortgagee). *Kamakshaya* v. *Chohan Ram*, A I R 1952 S C 401 =1952 S C J 553.

(1542) *S. 66 — Scope — Mortgagor's power to lease — Applicability of section.*

Section 66 has nothing to do with the mortgagor's power to lease the mortgaged property. S. 66 is a statutory enactment of the powers of the mortgagor in possession in regard to waste of mortgaged property. The mortgagor in possession is not liable for what in terms of the English Law of Real Property is known as permissive waste i. e., for omission to repair or to prevent natural deterioration. He is, however, liable for destructive waste i. e., acts which are destructive or permanently injurious to the mortgaged property if the security was insufficient or would be rendered insufficient by such acts. This section therefore has no application to the agent of a lease by the mortgagor in possession. *Kamakshaya* v. *Chohan Ram*, A I R 1952 S C 401 = 1952 S C J 553.

(1543) *S. 76 (a) and (e) — Mortgage of agricultural land — Mortgagee cannot lease out land for period extending beyond the period of mortgage unless there is a term to that effect in deed — Exception is in case of tenants in whom certain rights spring up by virtue of statute — But the exception will not apply where the term of mortgage deed prohibits creation of such leases — Held, on construction of deed that mortgagee could not grant such lease — Sections 20 and 21, Bihar Tenancy Act did not apply to the lessees—(Tenancy Laws—Bihar Tenancy Act (VIII (8) of 1885), Ss. 20, 21).*

The general rule is that a person cannot by transfer or otherwise confer a better title on another than he himself has. A mortgagee cannot, therefore, create an interest in the mortgaged property which will enure beyond the termination of his interest as mortgagee. Further, the mortgagee, who takes possession of the mortgag-

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ed property, must manage it as a person of ordinary prudence would manage it if it were his own; and he must not commit any act which is destructive or permanently injurious to the property. It follows that he may grant leases not extending beyond the period of the mortgage; any leases granted by him must come to an end at redemption. A mortgagee cannot during the subsistence of the mortgage act in a manner detrimental to the mortgagor's interests such as by giving a lease which may enable the tenant to acquire permanent or occupancy rights in the land, thereby defeating the mortgagor's right to khas possession; it would be an act which would fall within the provisions of Section 76, sub-clause (e).

A permissible settlement by a mortgagee in possession with a tenant in the course of prudent management and the springing up of rights in the tenant conferred or created by statute based on the nature of the land and possession for the requisite period is a different matter altogether. It is an exception to the general rule. In such a case, the tenant cannot be ejected by the mortgagor even after the redemption of the mortgage. He may become an occupancy raiyat in some cases and a non-occupancy raiyat in other cases. But the settlement of the tenant by the mortgagee must have been a bona fide one.

This exeception will not apply in a case where the terms of the mortgage prohibit the mortgagee from making any settlement of tenants on the land either expressly or by necessary implication. Where, for example, all the zamindari rights are given to the mortgagee, it may be possible to infer on the proper construction of the document that he can settle lands with tenants in the ordinary course of management and the tenants might acquire certain rights in the land in their capacity as tenants.

The ijara deed contained the following clause : "It is desired that the ijardar

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should enter into possession and occupation of the share let out in ijara (being the Khudkasht land under his own cultivation) cultivate them, pay 2 annas as reserved rent year after year to us, the executants and appropriate the produce thereof year after year on account of his having the ijardari interest":

Held that the term disentitles the mortgagee from locating tenants on the land mortgaged. 20 Cal. 708 (FB), Distinguished.

Held also that since the lessees were not "settled raiyats", Sections 20 and 21, Bihar Tenancy Act, did not apply and the lessees could not claim to have secured under the statute occupancy rights in the land.

The mortgagor therefore was entitled to the possession of land upon redemption of the mortgage. *Mahavir Gope* v. *Harbans Narain Singh*, A I R 1952 S C 205 = 1952 S C R 775 = 1952 S C J 292.

(1544) *Ss. 82, 92 — Suit for contribution — Plaintiff's rights against defendants — Provisions applicable — Contract Act (1872), S. 43.*

Three persons A, B and C separately owned properties of unequal value, Blackacre, Whiteacre and Greenacre. Their values at the material date were Rs. 30,000, Rs. 20,000 and Rs. 10,000 respectively. A, B and C, acting in various combinations from time to time, incurred debts. In order to clear off these debts A, B and C jointly mortgaged their three estates for Rs 10,000, the total aggregate sum due at the date of the mortgage from the three of them. There was no contract between them either in the mortgage deed or otherwise regarding their respective shares of responsibility in the Rs. 10,000 A's responsibility extended to Rs. 2,000. B's to Rs. 3,000 and C's to Rs 5,000. At the date of redemption, the mortgage debt had swo-

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llen to Rs. 15,000 A alone redeemed by selling Blackacre, which was his separate estate, to the mortgagee for Rs. 35,000 that being the value of Blackacre at the date of redemption. Rs. 15,000 of this was applied in satisfaction of the mortgage debt and the balance of Rs. 20,000 was retained by A :

Held both S. 43, Contract Act and S. 82, T. P. Act deal with the question of contribution. Section 43 is a provision of the Contract Act dealing with contracts generally. Section 82 applies to mortgages. As the right to contribution here arose out of a mortgage, S. 82 must exclude S. 43 because when there is a general law and a special law dealing with a particular matter, the special excludes the general. There being no contract to the contrary, A's only remedy was under S. 82, T. P. Act read with S. 82. As there was no personal covenant as between the mortgagors or any "contract to the contrary," the plaintiff A could not claim separate personal reliefs against the defendants B and C. *Kedar Lal* v. *Hari Lal*, A I R 1952 S C 47.

(1545) *S. 92 — Mortgage of joint property in Punjab—One co-mortgagor redeeming whole property — Subrogation — Extent of right of subrogee.*

The principles of justice, equity and good conscience apply to the Punjab where the provisions of the T. P. Act are not made applicable. Where one of the co-mortgagors redeems a mortgage over the property which belongs jointly to himself and the rest, equity as embodied in the doctrine of subrogation confers on him a right to reimburse himself for the amount spent in excess by him in the matter of redemption; he can call upon the co-mortgagors to contribute towards the excess which he has paid over his own share. To compel the co-debtors or co-mortgagors to pay more than their share of what was paid to the creditor or mortgagee is to perpetrate an inequity or injustice, as it means that the debtor who is in a position to pay and pays up can obtain an advantage for himself over the other joint debtors. Such a result will not be countenanced by equity. Hence, such a co-mortgagor stands in the mortgagee's shoes only to the extent of getting reimbursed from the co-mortgagors for their shares in the amount actually paid by him and not for the full amount due on the mortgage on the date of redemption: 40 E R 70; 14 Cal W N 617 and 25 Mad L J 16; *Rel. on*; A I R 1949 E P 254, *Affirmed. Ganeshi Lal* v. *Joti Pershad*, A I R 1953 S C 1 =1953 S C R 243=1952 S C J 649.

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(1546) S. 105 — Permanent tenancy — Evidence — Neither possession for generations at uniform rent, nor construction of permanent structure by itself is conclusive proof of permanent tenancy — It is the cumulative effect of these, coupled with several other facts, that may lead to inference of permanent tenancy—Tenancy held permanent: 43 Cal W N 828, *Rel. on. Bejoy Gopal* v. *Pratual Chander*, A I R 1953 S C 153 =1953 S C R 930=1953 S C J 195.

(1547) S. 105 — Permanent tenancy — Essentials — Permanent tenancy does not imply fixity of rent or occupation. *Bejoy Gopal* v. *Pratual Chander*, A I R 1953 S C 153 =1953 S C R 930 = 1953 S C J 195.

(1548) S. 105 — Payment of rent does not necessarily establish relationship of landlord and tenant — Such payment may only prove permissive occupation not amounting to any right or title to possession —(Landlord and Tenant). *Sheodhari Rai* v. *Suraj Prasad Singh*, A I R 1954 S C 758.

(1549) *S. 106 — Applicability to leases implied by law.*

The rule of construction embodied in S. 106, T. P. Act, applies not only to express leases of uncertain duration but also to leases implied by law which may be inferred from possession and acceptance of

rent and other circumstances. *Ram Kumar Das* v. *Jagdish Chandar*

A I R 1952 S C 23
=1952 S C R 269=1951 S C J 813.

(1550) *S. 106 — 'Contract to the contrary' should be valid.*

The contract to the contrary, as contemplated by S. 106, T. P. Act, need not be an express contract; it may be implied but it certainly should be a valid contract. If it is no contract in law, the section will be operative and regulate the duration of the lease. *Ram Kumar Das* v. *Jagdish Chandar*,

A I R 1952 S C 23
=1952 S C R 269
=1951 S C J 813.

(1551) *S. 106—Lease of land for building purposes for ten years fixing yearly rent — Lease inoperative under law — Acceptance of yearly rent—Tenancy from month to month arises by implication of law.*

The defendant executed a registered kabuliyat dated 8-12-1924 in favour of the Receiver who was in charge of the plaintiff's estate by which he purported to take a settlement of land in suit for building purposes for a period of 10 years at an annual rent. The first payment of annual rent was made on 8-3-1925 and the second payment was made on 16-3-1926. Since then no further payments were made. The kabuliyat not being an operative document under S. 107, T. P. Act, the question was whether the tenancy created by implication of law was a monthly tenancy under S. 106, T. P. Act.

Held that the tenancy created by implication of law in favour of the defendant should be held to be from month to month since its inception in 1924. The tenancy not being for manufacturing or agricultural purposes it could be regarded as a tenancy from month to month under S. 106, unless there was a contract to the contrary. The stipulation as to payment of annual rent would no doubt raise a presumption that the tenancy was from year to year but being contained in an

inoperative document could not come in the way of raising a presumption under S. 106. A lease for one year certain could not be inferred from the payment of annual rent because to do so would be to substitute a new agreement for the parties which they never intended to do : 11 Cal. W. N. 1124 & A. I. R. 1916 Cal. 358, *Approved. Ram Kumar Das* v. *Jagdish Chandar*,

A I R 1952 S C 23
=1952 S C R 269
=1951 S C J 813.

(1552) *S. 108 (j) — Covenant not to assign except on lessor's written consent — Lessor not to withhold consent unreasonably in case of respectable person — Agreement to assign to respectable person — Lessor witholding consent — Assignment whether breach of covenant—Specific performance of agreement—Specific Relief Act (1877), S. 12.*

Where a lease contains a covenant not to assign without first obtaining the written consent of the lessor and such consent is not to be unreasonably withheld in case of respectable or responsible person, an assignment by the lessee to a respectable person, without lessor's consent, does not amount to the breach of covenant on the part of the lessee. Even if it amounted to a breach of covenant entitling the lessor to forfeit the lease and sue for possesion, such a course would affect only the assignee and not the lessee who has already parted with the lease for a valuable consideration. The lessee cannot, therefore, resist the assignee's suit for specific performance of the agreement to assign the lease on this ground. *Kamala Ranjan* v. *Baijnath* A I R 1951 S C 1
=1951 S C J 13
=1950 S C R 840.

(1553) *S. 108 (j) — Covenant allowing assignment with lessor's consent — Consent not to be unreasonably withheld — Effect of clause.*

The words "such consent, however not to be unreasonably withheld in the case of

respectable or responsible person" contained in the covenant in a lease allowing the lessee to assign his interest only with the lessor's written consent, do not amount to a separate or independent covenant by the lessor that he would not refuse consent except upon reasonable grounds in the case of respectable or responsible person, but they limit or qualify the lessee's covenant not to assign the demised premises without the consent in writing of the lessor. In other words, those words have the effect of relieving the lessee from the burden of the covenant if the lessor withholds his consent unreasonably in case of proposed assignment to a respectable or responsible person. *Kamala Ranjan* v. *Baijnath*, **A I R 1951 S C 1 =1951 S C J 13=1950 S C R 840.**

(1554) *S. 108 (1)—Rent—Liability for — Several lessees — Inter se partition of mokarrari interest amongst mokarraridars —Effect.*

An *inter se* partition of the mokarrari interest amongst the mokarraridars cannot affect their liability qua the lessor for the payment of the whole rent, as several tenants of a tenancy in law constitute but a single tenant, & qua the landlord they constitute one person, each constituent part of which possesses certain common rights in the whole & is liable to discharge common obligations in its entirety. Such partitions amongst several lessees *inter se* are usually made for convenience of enjoyment of the leasehold but they do not in any way affect the integrity of the tenancy or make each holder of an interest in it as a separate holder of a different tenancy.

Similarly the allegation of partition *inter se* among the several owners of a lakhraj holding subject to mokarrari interest cannot in any way affect the integrity of the lease in the absence of an allegation of a fresh contract between the split-up owners of the holding & the different owners in the

mokarrari interest. *Badri Narain* v. *Rameshwar Dayal*, **A I R 1951 S C 186 =1951 S C J 252 =1951 S C R 153.**

(1555) *S. 111 (d) — Merger — Lessee acquiring share in leased property—Estate subject to lakhraj & Mokarrari interests— Acquisition by Mokarraridar of portion of lakhraj interest — (Landlord & tenant — Lease, merger).*

If the lessor purchases the lessee's interest, the lease no doubt is extinguished as the same man cannot at the same time be both a landlord and a tenant, but there is no extinction of the lease if one of the several lessees purchases only a part of the lessor's interest. In such a case the leasehold and the reversion cannot be said to coincide. Hence, in the case of an estate which is subject to *Lakhraj* and mokarrari interests, mere purchase by one of the several joint holders of the mokarrari interest, of portions of the lakhraj interest cannot bring about an extinction of the lease or break its integrity. There is no coalescence of the interest of the lessor and the lessee in the whole of the estate and that being so, the mokarrari interests of the purchaser does not merge in his lakhraj interest. *Badri Narain* v. *Rameshwar Dayal*, **A I R 1951 S C 186 =1951 S C J 252 =1951 S C R 153.**

(1556) *S. 111 (g)—Notice of intention to determine lease on forfeiture:*

The provision in S. 111 (g) as to notice in writing as a preliminary to a suit for ejectment based on forfeiture of a lease is not based on any principle of justice, equity or good conscience and cannot govern leases made prior to the coming into force of the Transfer of Property Act, 1882, or to leases executed prior to 1.4.1930. The rights and obligations under those leases have to be determined according to the rules of law

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prevailing at the time and the only rule applicable seems to be that a tenant cannot by his unilateral act and by his own wrong determine the lease unless the lessor gives an indication by some unequivocal expression of intention on his part of taking advantage of the breach: *Case law discussed.*

It is erroneous to suppose that every provision in the Transfer of Property Act and every amendment effected is necessarily based on principles of justice, equity and good conscience. It has to be seen in every case whether the particular provision of the Act relied upon restates a known rule of equity or whether it is merely a new rule laid down by the legislature without reference to any rule of equity and what is the true nature and character of the rule.

The statement in A. I. R 1948 Mad. 275 (F. B), that Ss. 105 to 116, Transfer of Property Act, are founded upon principles of reason and equity cannot be accepted either as correct or precise. Of course, to the extent that those sections of the Act give statutory recognition to principles of justice, equity and good conscience they are applicable also to cases not governed by the Act. *Nam Deo* v. *Narmadabai*,

A I R 1953 S C 228.

(1557) *S. 114—'The Court may pass an order.'*

The granting of relief against forfeiture under S. 114 is no doubt in the discretion of the Court but in exercising the discretion, each case must be judged itself, the delay, the conduct of the parties and the difficulties to which the landlord has been put should be weighed against the tenant: A I R 1916 Mad 680 (2), *Approved.*

It is a maxim of equity that a person who comes in equity must do equity and must come with clean hands and if the conduct of the tenant is such that it disentitled him to relief in equity, then the Court's hands are not tied to exercise it in his favour; AIR

Transfer of Property Act (1882)

1914 Mad 706 and A I R 1928 Mad 250, *Ref.*

Hence, the contention that though S. 114 confers a discretion on the Court, that discretion except in cases where third party interests intervene, must always be exercised in favour of the tenant irrespective of the conduct of the tenant cannot be accepted: (1912) A C 623, *Rel. on. Nam Deo* v. *Narmadabai*

A I R 1953 S C 228.

(1558(*S. 116—Acceptance of rent for period subsequent to determination of lease, long before expiry—Landlord's consent to continuing in possession, if can be inferred.*

For the application of S. 116 two things are necessary: (1) the lessee should be in possession after the termination of the lease; & (2) the lessor or his representative should accept rent or otherwise assent to his continuing in possession. The use of the word 'otherwise' suggests that acceptance of rent by the landlord has been treated as a form of his giving assent to the tenant's continuance of possession. There can be no question of the lessee "continuing in possession" until the lease has expired, & the context in which the provision for acceptance of rent finds a place clearly shows that what is contemplated is that the payment of rent & its acceptance should be made at such a time & in such a manner as to be equivalent to the landlord assenting to the lessee continuing in possession. Where the landlord had accepted rent for a period subsequent to the determination of the lease by the efflux of time nearly a year before the expiry of the lease, the consent of the landlord to the tenant's continuing in possession cannot be inferred: A I R 1949 Cal 47, *Affd.*

The fact that the payment was made at a time when there was no question of the lessor assenting to the lessee's continuing in possession & neither party treated the payment as importing such assent, is sufficient to take the case out of the mischief of

Travancore Public Servants (Inquiries) Act (1122)

S. 116. *Karnani Industrial Bank* v. *Prov. of Bengal*,

A I R 1951 S C 285
=1951 S C J 407=1951 S C R 560.

TRAVANCORE PUBLIC SERVANTS (INQUIRIES) ACT (11 of 1122)

(1559) *S. 1—'Our Government'—Means 'Council of Ministers'—(Words and Phrases)—(Constitution of India, Art. 166).*

The expression "Our Government" of the Travancore Act means the Maharaja's Government, in other words, the Government of State of Travancore. After the integration of the two States of Travancore and Cochin, and the formation of the United State of Travancore-Cochin the expression "Our Government" has to be construed according to the new set-up of Government and when the Council of Ministers had come into being, it is obvious that the expression "Our Government" as adapted to fit in with the new Constitution means "The Council of Ministers". Under the Constitution, the Rajpramukh or the Governor as head of the State is in such matters merely a constitutional head and he is bound to accept the advice of his Ministers.

Where, therefore, the order of the Government appointing the Enquiry Commissioner was issued after the council of ministers had pased a resolution to that effect, which must be presumed to have been communicated to the Rajpramukh in the normal course of business, it cannot be held to be ultra vires and without jurisdiction. *P. Joseph John* v. *State of Trovancore-Cochin.*

A I R 1955 S C 160.

TRUSTS

(1560) *Public, religious and charitable trust—'De facto' manager — Rights of — (Civil P. C. (1908), S. 92).*

A 'de facto' manager or a trustee 'de son tort' has certain rights. He can sue on behalf of the trust and for its benefit to recover properties and monies in the ordinary course of management. It is, however, one thing to say that because a person is a 'de facto' manager he is entitled to recover a particular property or particular sum of money which would otherwise be lost to the trust, for and on its behalf and for its benefit, in the ordinary course of management, it is quite another to say that he has the right to continue in 'de facto' management indefinitely without any vestige of title which is what a declaration of this kind would import. The Court would hesitate to make any such sweeping declaration. *Gopal* v. *Mohammad Jaffar*,

A I R 1954 S C 5.

Trusts Act (1882)

TRUSTS ACT (1882)

(1561) *S. 15—Obligations of trustee.*

A trustee cannot be asked to invest his own money for the benefit of 'cestui que trust'. The trustee is under no obligation to find a heavy sum of money and to invest it on the purchase of new shares for the benefit of the 'cestui que trust', and to recover the amount after having invested it in them. *R. Mathalone* v. *Bombay Life Assurance Company*,

A I R 1953 S C 385
=1954 S C R 117.

(1562) *S. 32—Right to indemnity.*

It is well settled that a trustee is not entitled to claim indemnity till he suffers an injury for which he has to be indemnified. *R. Mathalone* v. *Bombay Life Assurance Company.*

A I R 1953 S C 385
=1954 S C R 117.

(1563) *S. 94 — "To satisfy just demands."*

A requisition made on the trustee by some disclosed and other undisclosed beneficiaries cannot be regarded as a proper direction to him, which he could be called upon to obey. If the directions given to the trustee are of an inconclusive nature, and are in law ineffective, then the trustee

United State of Rajasthan Jagirdars (Abolition of Powers) Ordinance (1948)

cannot be mulcted in damages for not obeying them even if his attitute towards the beneficiary is not what it should have been. A. I. R. 1950 Bom 76, REVERSED *R. Mathalone* v. *Bombay Life Assurance Company.*

A I R 1953 S C 385
=1954 S C R 117.

UNITED STATE OF RAJASTHAN JAGIRDARS (ABOLITION OF POWERS) ORDINANCE (27 of 1948).

(1564) *S. 8A (inserted by Ordinance 10 of 1949 and amended by 15 of 1949) — Validity—(Constitution of India, Art. 14).*

A proper classification must always bear a reasonable and just relation to the things in respect of which it is proposed.

When the State of Rajasthan was formed in April and May 1949, the Jagirdars of only a part of the present State of Rajasthan could not collect their rents while Jagirdars in other areas which were covered by Jaipur Bikaner, Jaisalmer and Jodhpur and Matsya Union were under no such disability. In the former State of Rajasthan, provisions regarding the management by Government of Jagirs and the right to collect rents already existed, whereas there was no such provision in the former State of Jaipur, Bikaner, Jaisalmer and Jodhpur and Matsya Union, but when the integration took place in April and May 1949 the discrimination exhibited itself not by virtue of anything inherent in the impugned Ordinances but by reason of the fact that Jagirdars of one part of the present State of Rajasthan were already subjected to a disability in the matter of management of their Jagirs while the other parts were wholly unaffected. This discrimination, however undesirable, was not open to any exception until the Constitution came into force on January 26, 1950. Such an obvious discrimination could be supported only on the ground that it was based upon a reasonable classification.

U. P. Coal Control Order (1953)

In the absence of any allegation supported by evidence it could not be held that the Jagirdars of the particular area to which category the respondent belonged were differently situated to other Jagirdars. There was no real and substantial distinction why the Jagirdars of a particular area should continue to be treated with inequality as compared with the Jagirdars in another area of Rajasthan. No rational basis for any classification or differentiation had been made out. Section 8A of the impugned Ordinance as amended was a clear contravention of the respondent's right under Art. 14 of the Constitution and must be declared void. Case law distinguished. *State of Rajasthan* v. *Manohar Singh Ji.*

A I R 1954 S C 297
=1954 S C R 996
=1954 S C J 439.

U. P. COAL CONTROL ORDER (1953)

(1565) *Cl. 4 (3)—Validity—Reasonable restrictions—(Constitution of India, Art. 19 (1) (g) and (6)).*

The provision of Clause 4 (3) must be held to be void as imposing an unreasonable restriction upon the freedom of trade and business guaranteed under Article 19 (1) (g) of the Constitution and not coming within the protection afforded by clause (6) of the Article. *M/s. Dwarka Prasad* v. *State of U. P.*

A I R 1954 S C 224
=1954 S C R 803
=1954 S C J 238.

(1566) *Clause 5 (2) (b) — Validity — Reasonable restrictions — (Constitution of India, Art. 19 (6)).*

An unrestricted power has been given to the State Controller to make exemptions and even if he acts arbitrarily or from improper motives, there is no check over it and no way of obtaining redress. Clause 3

U. P. Debt Redemption Act (1940)

(2) (b) of the Control Order is, therefore, *prima facie* unreasonable. However, this portion of the Control Order, even though bad, is severable from the rest. *M/s Dwarka Prasad* v. *State of U. P.*,

A I R 1954 S C 224
=1954 S C R 803
=1954 S C J 238.

(1567) *Clauses 7 and 8 — Validity — Reasonable restrictions.*

Clauses 7 and 8 of the Control Order do not impose unreasonable restrictions upon the freedom of trade. *M/s Dwarka Prasad* v. *State of U. P.*, **A I R 1954 S C 224**
=1954 S C R 803
=1954 S C J 238.

U. P. DEBT REDEMPTION ACT (13 of 1940)

(1568) *Ss. 8, 2 (3) (b) and 2 (9) — Applicability of S. 8—Conditions—Loan — What is — 'Held,' the application was maintainable.*

It is clear from the wording of sub-s. (1) of S. 8 that there are three prerequisites for exercise of the right conferred by it, namely, (1) that the application must be by an agriculturist and (2) that agriculturist must be liable to pay the amount due under a decree to which this Act applies and (3) that that decree was passed before the commencement of this Act. Under S. 2 (6), the phrase "decree to which this Act applies" means a decree passed before or after the commencement of this Act in a suit to which this Act applies and S. 2 (17) defines the phrase "suit to which this Act applies" as meaning any suit or proceeding relating to a loan.

In order to be a "loan" the advance must be recoverable from an agriculturist. The word "recoverable" seems *prima facie*, to indicate that the crucial point of time is when the advance becomes recoverable, i. e., when the amount advanced becomes or falls due.

U. P. District Boards Act (1922)

A, a teacher in a college, executed a mortgage in favour of *B* in July 1931 along with his brothers who were admittedly agriculturists. *A* was assessed to income-tax in February 1932 under the Act passed in November 1931. He was not assessed to income-tax after 1936. A suit on the mortgage was filed in 1938 and decree was passed in March 1939. Application under S. 8 was filed in April 1942 by all the mortgagors :

Held that as *A* was not assessed to income-tax at the date of the advance in 1931 or on the due date under the deed i. e., in July 1937, or on the date of suit in 1938 or on the date of the application under S. 8 in 1942, it consequently followed that he was an agriculturist on all these dates. The other judgment-debtors were admittedly agriculturists. Therefore, the application under S. 8 was made by persons who were all agriculturists and who were liable to pay under a decree to which the Act applied and hence the application was maintainable. *Girjadharji* v. *Lakshmanji*, **A I R 1952 S C 218.**

U. P. DISTRICT BOARDS Act (10 of 1922), (as amended in 1933)

(1569) *Ss. 90 and 71 — Resolution for suspension of Secretary after resolution for his dismissal is passed — Validity — (Master & Servant) — (U. P. General Clauses Act (1 of 1904), S. 16).*

Where a District Board has passed a resolution for the dismissal of its Secretary under S. 71, it is not competent to the Board to pass a resolution for his suspension till the matter of his dismissal is decided on an appeal, if any, preferred by the Secretary to the Government.

Reading the present S. 71, along with S. 90, the power of suspension of the nature sought to be exercised by the Board was not the power of suspension contemplated in S. 90, sub-s. (3) of the Act. If the Secretary allowed the period of one month to expire without preferring an appeal against

U. P. District Boards Act (1922)

resolution to the Government or if the Government passed orders dismissing his appeal, if any, the resolution for his dismissal would become effective without any sanction of the Government. The words used therefore in S. 90, sub-s. (3) "pending the orders of any authority whose sanction is necessary for his dismissal" are inappropriate to the case in question and could not cover the case of a suspension in question.

The powers of dismissal and suspension given to the Board are defined and circumscribed by the provision of Ss. 71 and 90 of the Act and have to be culled out from the express provisions of those Sections. When express powers have been given to the Board under the terms of these Sections, it would not be legitimate to have resort to general or implied powers under the law of master and servant or under S. 16, U. P. General Clauses Act: A I R 1948 All 199, *Reversed. Hira Devi* v. *Dist. Board, Shahajahanpur,* A I R 1952 S C 362 =1952 S C R 1122 =1952 S C J 533.

(1570) *S. 174—Bye-law under sub-s. (2) (1) prohibiting of holding market—Validity —(Constitution of India, Art. 19 (1)(g)).*

Sub-sections (1) and (2) (1) of S. 174, U. P. District Boards Act, 1922, show that the power of the Board to make by laws is to be exercised for the purpose of promoting or maintaining the health, safety and convenience of the inhabitants of the area within its jurisdiction and that this power includes the power to regulate markets as mentioned in sub-s. (2) (1).

Where therefore certain District Board frames a bye-law to the effect that no person shall establish or maintain or run any cattle market in the District within its jurisdiction, the bye-law is not one passed for regulating the market but for prohibiting a person from holding it. Such a bye-law in face of the provisions of S. 174 is obviously beyond jurisdiction. The bye-law as well as

U. P. Food Grains (Futures and Options Prohibition) Order (1945)

the order under it interferes with the fundamental right of the petitioner under Art. 19 (1) (g) as it prevents him from carrying on the business of holding the market. It is thus in conflict with Art. 19 (1) (g) and is void: A I R 1950 S C 163, *Ref. Tahir Hussain* v. *District Board, Muzaffar Nagar,* A I R 1954 S C 630.

U. P. ENCUMBERED ESTATES ACT (25 OF 1934) (AS AMENDED IN 1939)

(1571) *Ss. 4, 6, 7—Scope.*

The provisions of the Amending Act have no retrospective operation. Therefore, where the Court allows the application of the landlord made under the Amending Act, for amendment of his original application under S. 4, the proceedings on which have been quashed, and passes an order under S. 6 that order has not the effect of invalidating the sale which was held when there was no pending application under S. 4 as result of the quashing of the proceedings. *Bhagwant Singh* v. *Sri Krishan Das,* A I R 1953 S C 136.

U. P. FOOD GRAINS (FUTURES AND OPTIONS PROHIBITION) ORDER (1945)

(1572) *Essential Supplies (Temporary Powers) Act (1946), Ss. 3, 4—Notification No. PY 603 (2)-I, dated 21-10-1946 as amended by Notification No. C. G., 603 (2)-III (1), dated 5-3-1947 and Notification No. PY 603 (2)-VI (1), dated 15-11-1947—Notification No. C. G. 603 (2)-III-(2), dated 5-3-1947 and Notification No. PY 603 (2)-VI (2), dated 15-11-1947—Effect of.*

The U. P. Food Grains (Futures and Options Prohibition) Order, 1945, was continued in force first by S. 5, Essential Supplies (Temporary Powers) Ordinance, 1946 and then by S. 17, Essential Supplies (Temporary Powers) Act, 1946, but was withdrawn by S. 9, U. P. Food Grains (Futures

U. P. Foodgrains (Futures and Options Prohibition) Order (1945)

and Options Prohibition) Order, 1951. By Notification No. PY 603 (2)-I, dated 21-10-1946 the Central Government directed that the powers conferred on it by S. 3 (1) of the 1946 Ordinance should, in relation to foodstuffs, be exercisable by the Provincial Government. By Notification No. C. G. 603 (2) III (1), dated 5-3-1947 and Notification No. PY 603 (2) VI (1), dated 15-11-1947, the earlier Notification No. 603 (2)-I, dated 21-10-1946 was amended by inserting therein the words "edible oils and oilseeds" and "pulses other than gram" and thereby excluding those commodities from the scope of the delegation. As a result of these amendments, the Provincial Governments could not, from and after the respective dates of those amending Notifications, make any order controlling production, supply, distribution of or trade and commerce in those commodities. These Notifications did not purport to affect Notifications that had been previously made. But simultaneously with these amending Notifications two more Notifications were issued, namely, Notification No. C. G. 603 (2)-III (2), dated, 5th March, 1947, and Notification No. PY 603 (2)-VI (2), dated the 15th November 1947. By these Notifications, the Central Government directed that no order made or deemed to be made under the Act by a Provincial Government should have effect so as to prohibit or restrict the movement of edible oils and oilseeds and pulses other than gram or to regulate or control the price, production or distribution of those commodities in any way. As a result of the joint operation of these Notifications the 1945 Order ceased to have effect so as to prohibit or restrict the movement of edible oils and oilseeds and pulses other than gram or to regulate or control the price, production or distribution of those commodities. Trade or commerce in any commodity cannot be controlled unless the price, production, distribution and movement of that commodity can also be controlled. It follows, therefore, that these two Notifications of 1947 quite effectively superseded the 1945 Order so far as it purported to regulate or control the price, production, distribution and movement of or trade and commerce in edible oils and oilseeds and pulses other than gram. *Chamber of Commerce* v. *State of U. P.*,

A I R 1955 S C 8.

U. P. Shri Badrinath Temple Act (1939)

(1573) *S. 9—Validity—Supreme Court judgment, dated 15-5-1952 — Interpretation and effect of — U. P. Foodgrains (Futures and Options Prohibition) Order, 1945 is not revived.*

It is wholly incorrect to say that the judgment pronounced by the Supreme Court on 15-5-1952 declared the U. P. Foodgrains (Futures and Options Prohibition) Order, 1951, ultra vires and invalid in its entirety. That judgment only declared it invalid to the extent of the restrictions complained of by the then petitioners, namely, in so far as it purported to restrict dealings in edible oils and oilseeds and pulses other than gram. The rest of that Order of 1951 and in particular S 9 by which the 1945 Order had been withdrawn remained unaffected by that judgment. In the circumstances, the Order of 1945 cannot be regarded as having been revived by the judgment in respect of edible oils and oilseeds and pulses other than gram in spite of the express withdrawal of that Order by S. 9 of the Order of 1951 which otherwise remains operative. *Chamber of Commerce* v. *State of U. P.*

A I R 1955 S C 8.

U. P. SHRI BADRINATH TEMPLE ACT (XVI [16] OF 1939)

(1574) *Ss. 3 (b) and 4—Construction of —Gift made to any person for his personal benefit within precincts of temple — If vests in donee or temple.*

Under the general law, nobody can be prevented from accepting a gift which another person may be inclined to make in

U. P. Shri Badrinath Temple Act (1939)

his favour, and it is immaterial in such cases at what place the gift is actually made.

If a legislation wants to take away the proprietary right which a person acquires under the ordinary law, it must express its intention in clear and unambiguous terms. There is nothing in the Shri Badrinath Temple Act which lays down that a gift made to any person inside the temple and intended for the benefit of that person shall not belong to him.

The definition of endowment in S. 3 (b) of the Act is no doubt couched in very wide language and includes in its scope gifts of property made to anyone within the precincts of the temple. But there is an apparent conflict between S. 3 (b) and S. 4 of the Act which deals with vesting of property and under which a gift does not vest in the temple at all unless it is made for the benefit of the Temple or for the convenience, comfort or benefit of the pilgrims. Interpretation of Ss. 3 (b) and 4 in A I R 1947 All 419, *Disapproved.*

'Quaere': Whether the expression 'gifts of property made to any one' in S. 3 (b) of the Act should not be construed to mean gifts made to any one for the benefit of the temple or for other purposes as are specified in S. 4? *Nar Hari* v. *Badri Nath Temple Committee,* **A I R 1952 S C 245 =1952 S C R 840=1952 S C J 310.**

(1575) *S. 25 (m) and (n) — Bye-laws under—Bye-law 8—Validity.*

Bye-law 8 of the Puja Bye-laws which forbids the acceptance of the gift by any person within the temple, unless he comes within the category of persons specifically authorised by the committee to receive the same, is a perfectly legitimate bye-law which it was quite competent for the committee to enact under the terms of Cls. (m) and (n) of S. 25 of the U. P. Shri Badrinath Temple Act. For the purpose of preventing over-crowding within the temple

U. P. State Road Transport Act (1951)

and to ensure order, decency and worshipful behaviour on the part of those who enter into it, the committee was quite justified in framing this bye-law which lays down in substance that whatever gifts a pilgrim might be desirous of making and which is unconnected with the offerings to the deity, shall be made outside the temple precincts and not inside it. The bye-law in question is not in any way, inconsistent with the provisions of the Act. It is certainly confined to the circumstances contemplated by the Statute itself and is not repugnant to the general principles of Hindu Law. It does not take away the proprietary right of any person which is recognised under ordinary law. *Nar Hari* v. *Badri Nath Temple Committee,* **A I R 1952 S C 245 =1952 S C R 840=1952 S C J 310.**

U. P. STATE ROAD TRANSPORT ACT (2 of 1951)

(1576) *Whether conflicts with the guarantee of freedom of inter-state and intra-state trade, commerce and intercourse provided under Art. 301?*

(Quære) — Points that could be raised and the different views that are possible in this respect indicated for purposes of future legislation — Relative scope of Art. 19 (1) (g) and Art. 301 indicated. *Saghbir Ahmad* v. *State of U. P.* **A I R 1954 S C 728 =1954 S C J 819.**

(1577) *S. 3—If infringes Art. 14 of the Constitution — (Constitution of India, Art. 14).*

The impugned legislation does not offend Art. 14 of the Constitution and is not invalid on that ground. Section 3 of the Act authorises the State Government to declare that the road transport service in general or on particular routes should be run and operated by the State Government exclusively or by the State Government in conjunction with railway or partly by the State Government and partly by others in accord-

U. P. State Road Transport Act (1951)

dance with the provisions of the Act. On a proper construction of this section the State is only to choose the routes or portions of routes on which the private citizens would be allowed to operate and the number of persons to whom permits should be given, and the granting of permits would necessarily be regulated by the provisions of Motor Vehicles Act. On this construction the discretion to be exercised by the State would be a regulated discretion guided by statutory rules. *Saghbir Ahmed* v. *State of U. P.*, **A I R 1954 S C 728 =1954 S C J 819.**

(1578) *Act infringes Art. 19 (1) (g) and is unconstitutional—(Constitution of India, Arts. 13 (2), 19 (1) (g) and (6).*

The U. P. State Road Transport Act violates the fundamental right guaranteed under Art. 19 (1) (g) of the Constitution and is not protected by Art. 19 (6) as it stood at the time of the enactment and as such must be held to be void under Art. 13 (2) of the Constitution. A I R 1954 All 257, *Reversed. Saghbir Ahmad* v. *State of U. P.* **A I R 1954 S C 728 =1954 S C J 819.**

(1579) *Validity—Act infringes, Art. 31 (2)—(Constitution of India, Art. 31 (2).)*

The U. P. State Road Transport Act is unconstitutional and invalid as it offends the provision of Art. 31 (2) of the Constitution. The effect of prohibition of the trade or business of the appellants by the impugned legislation amounts to deprivation of their property or interest in a commercial undertaking within the meaning of Art. 31(2) of the Constitution. The fact that the buses belonging to the appellants have not been acquired by the Government is not material. The property of a business may be both tangible and intangible. Under the statute the Government may not deprive the appellants of their buses or any other tangible property but they are depriving them of the business of running buses on hire on public roads. A I R 1954 All 257, *Reversed. Saghbir Ahmad* v. *State of U. P.*, **A I R 1954 S C 728 =1954 S C J 819.**

Vindhya Pradesh Application of Laws Ordinance (1948)

VINDHYA PRADESH CRIMINAL LAW AMENDMENT (SPECIAL COURTS) ORDINANCE (5 of 1949)

(1580) *S. 5 (2) — Right of appeal from decision of Special Judge — (Criminal P. C. (1898), Ss. 410, 417).*

Sub-section (2) of S. 5, Vindhya Pradesh Ordinance, is an express provision conferring a right of appeal to the aggrieved party, whether an accused or the State, against the judgment of the Special Judge. The only limitation in S. 5 (2) on the application of the provisions of the Criminal Procedure Code to the proceedings of the special Court is the one arising from the existence of any inconsistent provisions in the Ordinance and not with reference to the conduct of the proceedings before that very Court. Once the special Court is to be deemed a Court of Session, the normal right of appeal provided by S. 410 or S. 417, Criminal P. C., as the case may be, must be taken to have been expressly provided by reference and not as arising by mere implication. (1864) 10 H L C 704, *Distinguished. Shiv Bahadur Singh* v. *State of V. P.*, **A I R 1953 S C 394.**

VINDHYA PRADESH APPLICATION OF LAWS ORDINANCE (4 of 1948)

(1581) *S. 2—As amended by Ordinance 20 of 1949—Effect.*

The effect of these two ordinances was to extend to the entire state of Vindhya Pradesh with effect from 9 8.1948 the criminal law previously in force in the Rewa State, viz., the Indian Penal Code and the Criminal Procedure Code with adaptations 'mutatis mutandis'. But even assuming that S. 2 of the Ordinance failed to achieve its purpose on account of misconception as

Wajib-ul-arz

to the previous publication of any particular Rewa law in the Rewa Gazette that Rewa law would continue to be in force in the Rewa portion of United State of Vindhya Pradesh, as the Vindhya Pradesh law therefor, on the principle that on change of sovereignty over an inhabited territory the pre existing laws continue to be in force until duly altered. 1 Moo Ind App 175 (P C), *Foll. Shiv Bahadur Singh* v. *State of V. P.*, A I R 1953 S C 394.

WAJIB-UL-ARZ

(1582) *Agreements entered in—Binding effect.*

The entry regarding agreement in a Wajib-ul arz holds good during the period of the settlement in which it is made and becomes inoperative when the settlement has come to an end. A I R 1915 Lah 120; 11 Lah L T 56 and A I R 1941 Lah 239, *Rel. on. Chhote Khan* v. *Mal Khan*, A I R 1954 S C 575 =1954 S C J 577.

WEST BENGAL CRIMINAL LAW AMENDMENT (SPECIAL COURTS) AMENDING ACT (12 of 1952)

(1583) *S. 12 — Section has no application to pending appeals — Appeal against judgment of First Special Tribunal, Calcutta under Central Ordinance 29 of 1943 —Judgment set aside, constitution of Tribunal being held void under Art. 14, Constitution of India—Case remanded for retrial by competent Court — Only Court having jurisdiction to try held was Special Court under West Bengal Act 12 of 1952 - Jurisdiction held was not ousted by S. 12.*

The object of the legislature in enacting S. 12 of West Bengal Act 12 of 1952, was that cases pending before an ordinary or a non-special Court at the date when the West Bengal Ordinance 8 of 1952, came into existence and which were being tried in the ordinary way should not be brought on to or tried by the special Courts in spite of the provision of the new S 4 (1) introduced by the Ordinance into the Act. This reason manifestly could have no application to appellate proceedings, for there could be no question of cases pending in appeals being allotted to special Courts for trial.

West Bengal Criminal Law Amendment (Special Courts) Amending Act (1952)

To attract the operation of S. 12, it is necessary to show that the proceedings were pending before a Court other than a special Court on the 9th April, 1952. The expression "proceedings in a Court other than a special Court" occurring in S. 12 means and refers to proceedings relating to trial of a case in the original Court and not to proceedings in appeal.

How the case pending in the appellate Court, is to proceed further if the appellate Court directs a rehearing would depend entirely on the order which the appellate Court passes and is competent in law to pass. If the appeal Court directs retrial by an ordinary Court, as the Court competent to try the case or that is the implication of the order, the jurisdiction of the Special Court would be barred not by reason of S. 12 of the Special Act but by reason of the order made by the Appeal Court. The pendency of the appeal before the High Court on the relevant date (9th April 1952), could not attract the operation of S. 12 but where the appeals were taken to the High Court from the decision of a Court other than a special Court as contemplated by Act XII of 1952, whether the retrial directed by the High Court could be held by a Court under Act 12 of 1952, would depend on the nature and effect of the order which the High Court has made.

The High Court in an appeal against the judgment of the First Special Tribunal, Calcutta, constituted under the Central Ordinance 29 of 1943, did not acquit the accused, nor make any order of discharge in their favour but set aside the conviction and sentence and directed the retrial of the accused by a competent Court in accordance with law if the Government chose to proceed against them. The High Court set aside the proceedings of the special Court on the ground that the trial held by it became void on and from the 26th January 1950, as S. 5 (1) of the Ordinance under which the allotment of the case was made and the Tribunal acquired jurisdiction to try it, became void and inoperative as soon as the Constitution came into force, by reason of its being in conflict with Art. 14 of the Constitution.

Held that the Special Tribunal, from which the appeals came to the High Court

must be held according to the decision of the High Court itself to have lost seisin of these cases after 26th January, 1930, and they had no jurisdiction to proceed with the trial. As the High Court directed these cases to be tried by a competent Court, they could not possibly be sent back for trial to the Special Tribunal assuming that any such Tribunal existed or could be constituted by the Central Government. The only court which was competent to try these cases would be the special Court under Act 12 of 1952 and its jurisdiction could not be ousted as the order of the High Court itself proceeded on the footing that no trial could be held by the Tribunal constituted under the Central Ordinance 29 of 1943. The jurisdiction of the Special Court not being ousted by S. 12 of the Act or by the order of the High Court, the proceedings before it could not be quashed. *Edward Ezra* v. *State of Bengal*, **A I R 1955 S C 155.**

WEST BENGAL JUTE GOODS FUTURE ORDINANCE (5 of 1949)

(1584-85) *S. 2(1)(b)(i)—Dealing in jute goods — "Involving the actual delivery of possession" — Meaning of "involving" — Construction of words "actual delivery of possession" — A I R 1952 Cal 740 (SB)*, Reversed — *(Sale of Goods Act (1930), S. 33)*

The words used in S. 2 (1) (b) (i) of the Ordinance are "involving the actual delivery of possession thereof". The word "involving" in the context means resulting in and this condition will be satisfied if the chain contracts as entered into in the market result in actual delivery of possession of goods in the ultimate analysis.

To contrast the words "actual delivery of possession" with symbolical or constructive delivery and hold that only actual delivery of possession, meaning thereby physical or manual delivery, was within the intendment of the Ordinance is to place an unwarranted emphasis on those words. The use of the word "actual" in S. 2 (1) (b) (i) of the Ordinance was not indicative of the intention of the Government to include within the scope of the exemption only cases of actual delivery of possession as contrasted with symbolical or constructive delivery. To say that it was so indicative is to put a

construction which is too narrow. Even if regard be had to the mischief which was sought to be averted by the promulgation of the Ordinance, the Government intended to prevent persons who dealt in differences only and never intended to take delivery under any circumstances, from entering into the market. Provided a person habitually dealt in the sale or purchase of jute goods involving delivery of the goods, he was not to be included in the ban. This could be the only intendment of the Ordinance, because otherwise having regard to the ordinary course of business, business in jute goods would become absolutely impossible.

If the narrow construction of the expression "actual delivery of possession" was accepted it would involve each one of the intermediate parties actually taking physical or manual delivery of the goods from their sellers and again in their turn giving physicl or manual delivery of the goods which they had thus obtained to their immediate buyers. Such an eventuality could never have been contemplated by the Government and the only reasonable interpretation of the expression "actual delivery of possession" can be that actual delivery as contrasted with mere dealings in differences was within the intendment of the Ordinance and such actual delivery of possession included within its scope symbolical as well as constructive delivery of possession. AIR 1952 Cal 740 (SB), *Reversed. Duni Chand* v. *Bhuwalka Bros.*

AIR 1955 S C 182.

WEST BENGAL LAND DEVELOPMENT AND PLANNING ACT (21 of 1948)

(1586) *S. 8 — Constitutionality—Constitution of India, Art. 31 (5) and (6) — Scope and object.*

Article 31 (6) is intended to save a State law enacted within 18 months before the commencement of the Constitution provided the same was certified by the President, while, Art. 31 (5) saves all existing laws passed more than 18 months before the commencement of the Constitution. Reading the two clauses together, the intention is clear that an existing law passed within 18 months before January 26, 1950 is not to be saved unless it was submitted to the

West Bengal Land Development and Planning Act (1948)

President within three months from such date for his certification and was certified by him. The provision in S. 8 of the W. B. Land Development and Planning Act, relating to the conclusiveness of the declaration of Government as to the nature of the purpose of the acquisition held is unconstitutional and is not saved by Art. 31 (5) of the Constitution. *State of West Bengal* v. *Mrs. Bella Banerjee*, **A I R 1954 S C 170 =1954 S C R 558=1954 S C J 95.**

(1587) *S. 8, Proviso (b) — Validity — Constitution of India, Art. 31 (2) — Measure of compensation—Scope for legislative discretion — Principle which determines compensation which denies increment in value.*

While it is true that the legislature is given the discretionary power of laying down the principles which should govern the determination of the amount to be given to the owner for the property appropriated, such principles must ensure that what is determined as payable must be compensation, that is a just equivalent of what the owner has been deprived of. Within the limits of this basic requirement of full indemnification of the expropriated owner, the Constitution allows free play to the legislative judgment as to what principles should guide the determination of the amount payable. Whether such principles taken into account all the elements which make up the true value of the property appropriated and exclude matters which are to be neglected, is a justiciable issue to be adjudicated by the Court.

Considering that the West Bengal Act, 21 of 1948, is a permanent enactment and lands may be acquired under it many years after it came into force, the fixing of the market value on December 31, 1946 as the ceiling on compensation under the latter part of the proviso to S. 8, without reference to the value of the land at the time of the acquisition is arbitrary and cannot be regarded as due compliance in letter and spirit with the requirement of Art. 31 (2). For, the fixing of an anterior date for the ascertainment of value may not, in certain circumstances, be a violation of the Constitutional requirement as, for instance, when the proposed scheme of acquisition becomes known before it is launched and prices rise sharply in anticipation of the benefits to be derived under it, but the fixing of an anterior date, which might have no relation to the value of the land when it is acquired, may be, many years later, cannot but be regarded as arbitrary. Any principle for determining compensation which denies to the owner any increment in value cannot result in the ascertainment of the true equivalent of the land appropriated. *State of West Bengal* v. *Mrs. Bella Banerjee*, **A I R 1954 S C 170 =1954 S C R 558=1954 S C J 95.**

WILL

(1588) *Construction—Principles stated —On construction of will.*

It is seldom profitable to compare the words of one will with those of another or to attempt to find out to which of the wills, upon which decisions have been given in reported cases, the will in question approximates closely. Cases are helpful only in so far as they purport to lay down certain general principles of construction.

The cardinal maxim to be observed by Courts in construing a will is to endeavour to ascertain the intentions of the testator. This intention has to be gathered primarily from the language of the document which is to be read as a whole without indulging in any conjecture or speculation as to what the testator would have done if he had been better informed or better advised. In construing the language of the will, the Courts are entitled and bound to bear in mind other matters than merely the words used. They must consider the surrounding circumstances, the position of the testator, his family relationship, the probability that he would use words in a particular sense, and many other things which are often summed up in the somewhat picturesque figure "The Court is entitled to put itself into the testator's armchair.' But all this is solely as an aid to arriving at a right construction of the will, and to ascertain the meaning of its language when used by particular testator in that document. So soon as the construction is settled, the duty of the Court is to carry out the intentions as expressed, and none other. The Court is in no case justified in adding to testamentary dispositions. In all cases it must loyally carry out the will as properly construed, and this duty is universal, and is true alike of wills of every nationality and every religion or rank of life.

Will

A presumption against intestacy may be raised if it is justified by the context of the document or the surrounding circumstances; but it can be invoked only, when there is undoubted ambiguity in ascertainment of the intentions of the testator.

(On construction of the will, A I R 1946 Mad 419, *Reversed.*) *Gnambal Ammal* v. *Raju Ayyar*, **A I R 1951 S C 103 =1951 S C J 171=1950 S C R 949.**

(1589) *Nature of estate conferred by will — Presumption of absolute ownership —Displacing of.*

In cases where the intention of the testator is to grant an absolute estate, an attempt to reduce the powers of the owner by imposing restraint on alienation would certainly be repelled on the ground of repugnancy; but where restrictions are the primary things which the testator desires and they are consistent with the whole tenor of the will, it is a material circumstance to be relied upon for displacing the presumption of absolute ownership implied in the use of the word "*malik.*" *Raj Bajrang Bahadur Singh* v. *Thakurain Bakhraj Kuer*, **A I R 1953 S C 7 =1953 S C R 232=1952 S C J 655.**

(1590) *Construction by analogy—(Succession Act (1925), S. 74).*

Rule of construction by analogy is a dangerous one to follow in construing wills differently worded and executed in different surroundings : A I R 1922 P C 63, *Rel. on. Lakshmana Nadar* v. *R. Ramier*, **A I R 1953 S C 304 =1953 S C R 848=1953 S C J 420.**

(1591) *Creation of Hindu widow's estate by will — Intention of testator — Held that the estate created was life estate and not widow's estate — (Hindu Law—Will) — (Succession Act (1925), Ss. 74, 95 and 104).*

A Hindu can by will create a life estate, or successive life estates, or any other estate for a limited term, provided the donee or the persons taking under it are capable of taking under a deed or will. He can confer by means of a will on his widow the same estate which she would get by inheritance, namely, Hindu widow's estate. The widow in such a case takes as a demisee and not as an heir. The Court's primary duty in such cases is to ascertain from the language employed by the testator "what were his intentions", keeping in view the surrounding circumstances, his ordinary notions as a

Will

Hindu in respect to devolution of his property, his family relationships etc.; in other words, to ascertain his wishes by putting itself, so to say, in his armchair. The widow cannot be held to have been given a full Hindu widow's estate under the will unless it can be said that under its terms she was given the power of alienation for necessary purposes, whether in express terms or by necessary implication.

The testator, a Brahmin died leaving him surviving a widow *R* and a married daughter *L* who had a number of children. They were all alive when the testator died. By his will the testator gave the following directions:— "After my lifetime, you the aforesaid *R* my wife, shall till your lifetime enjoy the aforesaid entire properties, the outstanding due to me, the debts payable by me, and the chit amounts payable by me. After your lifetime *L* our daughter and wife of *A* (the plaintiff) and her heirs shall enjoy them with absolute rights and powers of alienation such as gift, exchange, and sale from son to grandson and so on for generations. As regards the payment of maintenance to be made to *C*, wife of my late son, my wife *R* shall pay the same as she pleases, and obtain a release deed." *L* died during the life time of the widow *R*. None of her children survived her :

Held that the estate conferred on *R*, the widow was more like the limited estate in the English sense of the term than like a full Hindu widow's estate. The limited powers of alienation given to her fell short of widow's estate. She had complete control over the income of the property during her lifetime but she had no power to deal with the corpus of the estate and it had to be kept intact for the enjoyment of the daughter. Though the daughter was not entitled to immediate possession of the property it was indicated with certainty that she should get the entire estate at the proper time and she thus got an interest in it on the testator's death. She was given a present right of future enjoyment in the property. She got under this will a vested interest in the testator's properties on his death. *Case Law Ref. Lakshmana Nadar* v. *R. Ramier*, **A I R 1953 S C 304 = 1953 S C R 848 = 1953 S C J 420.**

(1592) *True intention of testator—How to be gathered.*

The true intention of the testator has to

Words and Phrases

be gathered not by attaching importance to isolated expressions but by reading the will as a whole with all its provisions and ignoring none of them as redundant or contradictory. *Raj Bajrang Bahadur Singh* v. *Thakurain Bakhraj Kuer*,

A I R 1953 S C 7=1953 S C R 232
= 1952 S C J 655.

WORDS AND PHRASES

(1593) "*Due process of law*".

Per Mukherjee J.— "Due" means "What is just and proper" according to the circumstances of a particular case. The best description of the expression "Due process of law" would be to say that it means in each particular case such an exercise of the powers of Government as the settled maxims of law permit and sanction and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs. *Gopalan* v. *State of Madras*, A I R 1950 S C 27
=1950 S C R 88=1950 S C J 174.

(1594) *Malik.*

The word 'Malik' is of very common use in many parts of India & it cannot certainly be regarded as a technical term of conveyancing. When used in a will or other document as descriptive of the position which a devisee or donee is intended to hold it has been held apt to describe an owner possessed of full proprietary rights, including a full right of alienation, unless there is something in the context or in the surrounding circumstances to indicate that such full proprietary rights were not intended to be conferred : A. I. R. (9) 1922 P. C. 63, *Rel. on. Ram Gopal* v. *Nand Lal*,

A I R 1951 S C 139
= 1950 S C J 575
= 1950 S C R 766.

(1595) *Malik Kamil and naslan bad naslan—Meaning.*

The words "*Malik Kamil*" (absolute owner) and "*naslan bad naslan*" (generation after generation) used in a will are descriptive of a heritable and alienable estate in the donee, and they connote full proprietary rights unless there is something in the context or in the surrounding circumstances which indicate that absolute rights were not intended to be conferred. *Raj Bajrang Bahadur Singh* v. *Thakurain Bakhraj Kuer*, A I R 1953 S C 7
= 1953 S C R 232
= 1952 S C J 655.

Words and Phrases

(1596) "*Practice*" *and* "*Procedure*".

"Practice" in its largar sense like procedure, denotes to mode of proceeding by which a legal right is enforced as distinguished from the law that gives and defines the right. "Procedure" means the mode in which succesive steps in litigation are taken. *State of Seraikella* v. *Union of India*,

A I R 1951 S C 253
= 1951 S C J 425
= 1951 S C R 474.

(1597) "*Public safety*", *meaning of.*

"Public safety" ordinarily means security of the public or their freedom from danger. In that sense, anything which tends to prevent dangers to public health may also be regarded as securing public safety. The meaning of the expression must, however, vary according to the context. *Romesh Thapar* v. *State of Madras*,

A I R 1950 S C 124
= 1950 S C J 418
= 1950 S C R 594.

(1598) *Signature, meaning of—General Clauses Act (1897), S. 3 (56).*

It is quite true that when signature by an agent is permissible, the writing of the name of the principal by the agent is regarded as the signature of the principal himself. But this result only follows when it is permissible for the agent to sign the name of the principal. If on a construction of a statute signature by an agent is not found permissible then the writing of the name of the principal by the agent however clearly he may have been authorised by the principal cannot possibly be regarded as the signature of the principal for the purposes of that statute. If a statute requires personal signature of a person, which included a mark, the signature or the mark must be that of the man himself. There must be physical contact between that person and the signature or the mark put on the document. *Commr. of Agril. I. T.* v. *Keshab Chandra*,

A I R 1950 S C 265
= 1950 S C J 364
= 1950 S C R 435.

(1599) Tamliknama — Means document transferring 'Maliki' or ownership rights. *Ram Gopal* v. *Nand Lal*,

A I R 1951 S C 139
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PART II

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PRACTICE & PROCEDURE

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PART II

SUPREME COURT PRACTICE & PROCEDURE

PRELIMINARY.

Supreme Court is a Court of Record. — Article 129 of the Constitution of India provides that the Supreme Court shall be a Court of Record and shall have all powers of such a Court including the power to punish for contempt of itself. The acts and judicial proceedings of a Court of Record are enrolled for a perpetual memory and testimony and the power to punish for contempts of itself belongs to such a Court. The Federal Court of India of which the present Supreme Court of India is a successor was also a Court of Record and has as such power to punish for contempts of itself.— *Gauba* v. *Chief Justice*, (1941) F C R 54 (57).

Seat of Supreme Court. — Article 130 of the Constitution of India makes a provision in this respect. It enacts that the Supreme Court shall sit in India or in such other place or places as the Chief Justice of India may, with the approval of the President, from time to time appoint.

JURISDICTION OF THE SUPREME COURT.

ORIGINAL JURISDICTION.

(i) Power to issue directions or orders or writs for enforcement of fundamental rights guaranteed by Part III of Constitution :

Article 32 of the Constitution of India guarantees the enforcement of fundamental rights mentioned in Articles 13 to 31 of the Constitution and runs as under :—

Remedies for enforcement of rights conferred by this Part.

" 32. (1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights, conferred by this Part [Part III] is guaranteed.

(2) The Supreme Court shall have power to issue direction or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.

(3) Without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2), Parliament may by law empower any other Court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2).

(4) The rights guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution."

(ii) Exclusive jurisdiction in certain disputes :—

The Supreme Court has, subject however to the provisions of the Constitution, exclusive original jurisdiction in any dispute—

(a) between the Government of India and one or more States ; or

(b) between the Government of India and any State or States on one side and one or more other States on the other ; or

(c) between two or more States,

if and in so far as the dispute involves any question (whether of law or fact) on which the existence or extent of a legal right depends ;

The aforesaid jurisdiction shall not, however, extend to :—

(i) a dispute to which a State specified in Part B of the First Schedule is a party, if the dispute arises out of any provision of a treaty, agreement, covenant, engagement, sanad or other similar instrument which was entered into or executed before the commencement of this Constitution and has or has been continued in operation after such commencement :

(ii) a dispute to which any State is a party, if the dispute arises out of any provision of treaty, agreement, covenant, engagement, sanad or other similar instrument which provides that the said jurisdiction shall not extend to such a dispute. (*Vide* Art. 131.)

APPELLATE JURISDICTION.

(i) Appellate jurisdiction where the case involves a substantial question of law as to the interpretation of the Constitution :—

An appeal shall lie to the Supreme Court from any judgment, decree or final order of a High Court in the territory of India, whether in a civil, criminal or other proceeding, if the High Court certifies that the case involves a substantial question of law as to the interpretation of the Constitution. Where, however, the High Court has refused to give such a certificate, the Supreme Court may itself grant a special leave to appeal from such judgment, decree or final order, if it is satisfied that the case involves a substantial question of law as to the interpretation of the Constitution. (*Vide* Article 132 (1) & (2)). In either of the cases referred to above, any party to the case may appeal to the Supreme Court that any such question as aforesaid has been wrongly decided, and, with the leave of the Supreme Court on any other ground. The final order referred to above includes an order deciding an issue, which if decided in favour of the appellant, would be sufficient for the final disposal of the case : (*Vide* Article 132 (3)).

(ii) Appellate Jurisdiction of Courts in regard to Civil matters. — Article 133 of the Constitution provides that an appeal shall lie to the Supreme Court from any judgment, decree or final order in a civil proceeding of a High Court in the territory of India if the High Court certifies—

(a) that the amount or value of the subject-matter of the dispute in the Court of first instance and still in dispute on appeal was and is not less than twenty thousand rupees or such other sum as may be specified in that behalf by Parliament by law ; or

(b) that the judgment, decree or final order involves directly or indirectly some claim or question respecting property of the like amount or value, or

(c) that the case is a fit one for appeal to the Supreme Court; and where the judgment, decree or final order appealed from affirms the decision of the

Court immediately below in any case other than a case referred to in sub-clause (c), if the High Court further certifies that the appeal involves some substantial question of law.

Any party appealing to the Supreme Court under the above provision may also urge as one of the grounds in such appeal that a substantial question of law as to the interpretation of the Constitution has been wrongly decided by the High Court, from the judgment, decree or final order whereof the appeal has been preferred (*vide* Article 133 (2)). No appeal shall, however, lie to the Supreme Court from the judgment, decree or final order of a single judge of a High Court, unless the Parliament by law otherwise provides, *vide* Article 133 (3).

(iii) Appellate jurisdiction in regard to criminal matters :

Article 134 of the Constitution confers on the Supreme Court jurisdiction to hear appeals from High Courts in regard to criminal matter in the following terms :—

134. (1) An appeal shall lie to the Supreme Court from any judgment, final order or sentence in a criminal proceeding of a High Court in the territory of India if the High Court —

(a) has on appeal reversed an order of acquittal of an accused person and sentenced him to death ; or

(b) has withdrawn for trial before itself any case from any Court subordinate to its authority and has in such trial convicted the accused person and sentenced him to death ; or

(c) certifies that the case is a fit one for appeal to the Supreme Court :

Provided that an appeal under sub-clause (c) shall lie subject to such provision as may be made in that behalf under clause (1) of Article 145 and to such conditions as the High Court may establish or require.

(2) Parliament may by law confer on the Supreme Court any further powers to entertain and hear appeals from any judgment, final order or sentence in a criminal proceeding of a High Court in the territory of India subject to such conditions and limitations as may be specified in such law."

3. Residuary jurisdiction as successor to Federal Court :

The Supreme Court is a successor of the former Federal Court. Accordingly Article 135 provides that it shall have jurisdiction and powers with respect to any matter to which the provisions of Articles 133 and 134 (referred to in (i) and (ii) above) do not apply, if the jurisdiction and powers in relation to that matter were exercisable by the Federal Court immediately before the commencement of the Constitution under any existing law.

4. Special leave to appeal :

The Supreme Court has, by Article 136, been invested with wide discretionary powers to grant special leave to appeal from any judgment, decree, determination, sentence, or order in any cause or matter passed or made by any Court or tribunal in the territories of India, except the judgment, determination, sentence or order passed or made by any Court or tribunal constituted by or under any law relating to the Armed Forces, notwithstanding the provisions referred to above (i. e. Articles 131 to 135 of the Constitution of India). Article 136 is reproduced below for facility of reference.

"**136.** (1) Notwithstanding anything in this Chapter the Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any Court or tribunal in the territory of India.

Special leave to appeal by the Supreme Court.

(2) Nothing in clause (1) shall apply to any judgment, determination, sentence or order passed or made by any Court or tribunal constituted by or under any law relating to the Armed Forces.

5. Jurisdiction to renew its own judgment or orders :—

Article 137 provides that subject to the provisions of any law made by Parliament or any rules made under Article 145, the Supreme Court shall have powers to review any judgment pronounced or order made by it.

6. Jurisdiction that may be conferred by Parliament under Articles 139 and 140 :

Parliament may by law confer on the Supreme Court power to issue direction, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any of them, for any purposes other than those mentioned in clause (2) of Article 32.

Parliament may by law make provision for conferring upon the Supreme Court such supplemental powers not inconsistent with any of the provisions of this Constitution as may appear to be necessary or desirable for the purpose of enabling the Court more effectively to exercise the jurisdiction conferred upon it by or under this Constitution.

POWERS OF SUPREME COURT.

Article 142 of the Constitution of India enumerates the powers of the Supreme Court in the matter of the enforcement of decrees and orders of the Supreme Court and other powers and runs as under :—

"**142.** (1) The Supreme Court in the exercise of its jurisdiction may pass such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or order so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and until provision in that behalf is so made, in such manner as the President may by order prescribe.

Enforcement of decrees and orders of Supreme Court and orders as to discovery, etc.

(2) Subject to the provisions of any law made in this behalf by Parliament, the Supreme Court shall, as respects the whole of the territory of India, have all and every power to make any order for the purpose of securing the attendance of any person, the discovery or production of any documents, or the investigation or punishment of any contempt of itself.

Power of President to consult Supreme Court.

Article 143 empowers the President to refer to Supreme Court any question of law and fact of public importance. The said Article 143 is reproduced below for facility of reference.

"**143.** (1) If at any time it appears to the President that a question of law or fact has arisen, or is likely to arise, which is of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court upon it he may refer the question to that Court for consideration and the Court may, after such hearing as it thinks fit, report to the President its opinion thereon.

Power of President to consult Supreme Court.

(2) The President may, notwithstanding anything in clause (i) of the proviso to Article 131, refer a dispute of the kind mentioned in the said clause to the Supreme Court for opinion and the Supreme Court shall after such hearing as it thinks fit, report to the President its opinion thereon."

Supremacy of Supreme Court :

Article 141 enacts that the law declared by the Supreme Court shall be binding on all Courts within the territory of India, while Art. 144 lays down that all authorities, civil and judicial in the territory of India shall act in aid of the Supreme Court.

Rule-making Power of Supreme Court :

Article 145 empowers the Supreme Court to make rules, with the approval of the President, for regulating generally the practice and procedure of the Court and is reproduced below.

"**145.** (1) Subject to the provisions of any law made by Parliament, the Supreme Court may from time to time, with the approval of the President, make rules for regulating generally the practice and procedure of the Court including —

Rules of Court, etc.

(a) rules as to the persons practising before the Court;

(b) rules as to the procedure for hearing appeal and other matters pertaining to appeals including the time within which appeals to the Court are to be entered;

(c) rules as to the proceedings in the Court for the enforcement of any of the rights conferred by Part III;

(d) rules as to the entertainment of appeals under sub-clause (c) of clause (1) of Article 134;

(e) rules as to the conditions subject to which any judgment pronounced or order made by the Court may be reviewed and the procedure for such review including the time within which applications to the Court for such review are to be entered;

(f) rules as to the costs of and incidental to any proceedings in the Court and as to the fees to be charged in respect of proceedings therein;

(g) rules as to the granting of bail;

(h) rules as to stay of proceedings;

(i) rules providing for the summary determination of any appeal which appears to the Court to be frivolous or vexatious or brought for the purpose of delay;

(j) rules as to the procedure for inquiries referred to in clause (1) of Article 317.

(2) Subject to the provisions of clause (3) rules made under this article may fix the minimum number of Judges who are to sit for any purpose, and may provide for the powers of single Judges and Division Courts;

(3) The minimum number of Judges who are to sit for the purposes of deciding any case involving a substantial question of law as to the interpretation of this Constitution or for the purpose of hearing any reference under Article 143 shall be five:

Provided that where the Court hearing an appeal under any of the provisions of this Chapter other than Article 132 consists of less than five Judges and in the course of the hearing of the appeal the Court is satisfied that the appeal involves a substantial question of law as to the interpretation of this Constitution the determination of which is necessary for the disposal of the appeal, such Court shall refer the question for opinion to a Court constituted as required by this clause for the purpose of deciding any case involving such a question and shall on receipt of the opinion dispose of the appeal in conformity with such opinion.

(4) No judgment shall be delivered by the Supreme Court save in open Court and no report shall be made under Article 143 save in accordance with an opinion also delivered in open Court.

(5) No judgment and no such opinion shall be delivered by the Supreme Court save with the concurrence of a majority of the Judges present at the hearing of the case, but nothing in this clause shall be deemed to prevent a Judge who does not concur from delivering a dissenting judgment or opinion."

In exercise of the power conferred by Art. 145 reproduced above, the Supreme Court made rules for the first time in 1950. The said Rules have been amended in January, 1954 and July 1954, and the original rules as amended, are now in force from 26th January 1954 and form the subject-matter of this Part.

THE SUPREME COURT RULES, 1950

*[as amended till 10th July 1954]

The Supreme Court of India, in the exercise of its rule-making powers, and with the approval of the President, hereby makes the following rules :—

PART I

General

ORDER I

INTERPRETATION, ETC.

1. These Rules may be cited as the Supreme Court Rules, 1950, and shall be deemed to have come into operation on the twenty-sixth day of January, 1950.

2. (1) In these Rules, unless the context otherwise requires—

"Advocate" means a person entitled to appear and plead before the Supreme Court;

Right of an Advocate of the Supreme Court to plead and to act in all High Courts:—Since coming into force of the Supreme Court Advocate (Practice in High Courts) Act, 1951, an Advocate of the Supreme Court has become entitled, as of right, to appear and plead as well as to act in all the High Courts, including the High Court in which he is already enrolled without:any differentiation being made for this purpose between the various jurisdictions exercised by those Courts, that is to say, on the original as well as on Appellate Side—*Aswini Kumar Ghose* v. *Arabinda Bose*, A. I. R. 1952 S. C. 369=1953 S. C. R. 1=1952 S. C. J. 568.

"Advocate on Record" means an Advocate who is entitled under these Rules to act as well as to plead for a party in the Court;

"Agent" means an Agent on the Rolls of the Court as on the 26th January 1954;

"Chief Justice" means the Chief Justice of India;

"Code" means the Code of Civil Procedure, 1908;

"Constitution" means the Constitution of India;

"Court" and "this Court" mean the Supreme Court of India;

"Judge" means a Judge of the Court;

"Judgment" includes decree, order, sentence or decision of any court, judge or judicial officer;

"High Court" means—

(i) as respects anything done before the commencement of the Constitution, a High Court within the meaning of section 219 of the Government of India Act, 1935; and

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* Published in the Gazette of India Extra-ordinary dated 28th January 1950 and amended by Supreme Court of India Notifications dated 25th April 1950; 5th July 1950; 19th August 1950; 18th June 1951; 6th May 1952; 16th January 1954 and 10th July 1954.

(ii) as respects anything done or to be done after the commencement of the Constitution, a High Court established by or recognised under the Constitution;

"Court appealed from" includes a tribunal and any other judicial body from which an appeal is preferred to the Court;

"Party" and all words descriptive of parties to proceedings before the Court (as "appellant" "respondent" "plaintiff" "defendant" and the like) include, in respect of all acts proper to be done by an Advocate on Record the Advocate on record of the party in question, where such party is represented by an Advocate on record;

"Prescribed" means prescribed by or under these Rules;

"Record" in Part II of these Rules means the aggregate of papers relating to an appeal (including the pleadings, proceedings, evidence and judgments) proper to be laid before the Court at the hearing of the appeal;

"Registrar" and 'Registry" mean respectively the Registrar and Registry of the Court;

"Respondent" includes an intervener;

"Rules of Court" includes the forms appended to these Rules;

"Signed", save in the case of a judgment and decree, includes stamped;

"Taxing Officer" is the officer of the Court whose duty it is to tax costs.

(2) The General Clauses Act, 1897, applies for the interpretation of these Rules as it applies for the interpretation of an Act of Parliament.

3. Where, by these Rules or by any order of the Court, any step is required to be taken in connection with any cause, appeal, or matter before the Court, that step shall, unless the context otherwise requires, be taken in the Registry.

4. Where any particular number of days is prescribed by these Rules, the same shall be reckoned exclusively of the first day and inclusively of the last day, unless the last day shall happen to fall on a day on which the offices of the Court are closed, in which case the time shall be reckoned exclusively of that day also and of any succeeding day or days on which the offices of the Court continue to be closed.

ORDER II

Offices of the Court : Sittings and Vacation, etc.

1. The offices of the Court, except during vacation and on Saturdays and holidays, shall, subject to any order by the Chief Justice, be open daily from 10 A. M. to 4-30 P. M. but no work, unless of an urgent nature, shall be admitted after 4 P. M.

2. The offices of the Court shall, except during vacation, be open on Saturdays from 10-30 A. M. to 1-30 P. M. but no work, unless of an urgent nature shall be admitted after 12-30 P.M.

3. The offices of the Court shall be open during vacation, except on Saturdays and holidays, at such times as the Chief Justice may direct.

4. The Court shall sit in two terms annually, the first commencing from the seventh day of January and ending on the last Friday in May, and the second commencing from the 2nd Monday in September and ending on the 23rd December.

5. The Court shall not ordinarily sit on Saturdays, nor on any other days notified as Court holidays in the *Gazette of India*.

6. A Judge shall be appointed by the Chief Justice before the commencement of each long vacation for the hearing of all matters which may require to be immediately or promptly dealt with and whenever necessary a Division Court may likewise be appointed by the Chief Justice, for the disposal of cases during the vacation.

ORDER III

OFFICERS OF THE COURT, ETC.

1. The Registrar shall have the custody of the records of the Court and shall exercise such other functions as are assigned to him by these Rules.

2. The Cheif Justice may assign, and the Registrar may with the approval of the Chief Justice delegate, to a Deputy Registrar or Assistant Registrar, any functions required by these Rules to be exercised by the Registrar.

3. In the absence of the Registrar, the Deputy Registrar may exercise all the functions of the Registrar.

4. The Official Seal to be used in the Court shall be such as the Chief Justice may from time to time direct, and shall be kept in the custody of the Registrar.

5. Subject to any general or special directions given by the Chief Justice, the Seal of the Court shall not be affixed to any writ, rule, order, summons or other process save under the authority in writing of the Registrar.

6. The Seal of the Court shall not be affixed to any certified copy issued by the Court save under the authority in writing of the Registrar or of a Deputy Registrar or Assistant Registrar.

7. The Registrar shall keep a list of all cases pending before the Court and shall, subject to these Rules and to any general or special directions given by the Chief Justice, prepare the list of cases ready for hearing and shall cause public notice to be given thereof.

8. In addition to the powers conferred by other rules, the Registrar shall have the following duties and powers subject to any general or special order of the Chief Justice :—

(i) to require any plaint, petition of appeal, petition or other proceeding presented to the Court to be amended in accordance with the practice and procedure of the Court or to be represented after such requisition as the Registrar is empowered to make in relation, thereto, has been complied with ;

(ii) to fix the date of hearing of appeals, petitions or other proceedings and issue notices thereof ;

(iii) to settle the index in cases where the record is prepared in the Supreme Court ;

(iv) to make an order for change of Advocate on record with the consent of the Advocate on record ;

(v) to direct any formal amendment of record ;

(vi) to grant leave to inspect and search the records of the Court and order the grant of copies of documents to parties to proceedings ;

(vii) to allow from time to time any period or periods not exceeding four weeks in the aggregate for furnishing information, complying with requisitions or for doing any other act necessary to make a plaint petition or appeal complete.

ADVOCATES

1. In this Order "High Court" includes a Court of the Judicial Commissioner and any reference to a Judge of the High Court shall be deemed to include a reference to the Judicial Commissioner or any Additional Judicial Commissioner.

2. A person qualified as hereinafter mentioned may apply to be enrolled as an Advocate of the Court and, if his application is granted shall, on payment of the prescribed fee, be entitled to be so enrolled.

3. A person shall not be qualified for being enrolled as an Advocate unless he—

(1) (a) possesses a degree in law of an Indian University ;

or

(b) is a member of the English Bar ;

and

(2) is and has been for not less than seven years enrolled as an Advocate in a High Court in the territory of India.

The period during which a person was entitled as of right to practise as a vakil in a High Court in Part A State or as a vakil or pleader in a High Court in Part B or Part C State immediately before his enrolment as an Advocate in that High Court, may be taken into account for the purpose of calculating the above-mentioned period of seven years.

4. Every applicant for enrolment as an Advocate shall produce the following documents :—

(i) A copy of his enrolment certificate in his own High Court duly authenticated by the Registrar of the High Court ;

(ii) A certificate from the Registrar of the High Court that he has been and is still an Advocate of that High Court ;

(iii) A certificate of character obtained from the Attorney-General for India, or the Advocate-General of the State concerned, or a Judge of the High Court of that State.

5. The Chief Justice and Judges may, if for any special reason they think it desirable to do so, permit the enrolment of any other person, who is in their opinion sufficiently qualified, as an Advocate, or permit such person to appear as an advocate in a particular case.

6. The Roll of Advocates shall be in two parts, one containing the names of Senior Advocates and the other the names of other Advocates.

7. An Advocate of the Supreme Court or an Advocate with not less than ten years' standing in a High Court and qualified to be enrolled as an Advocate of the Supreme Court, may apply to be enrolled in the list of Senior Advocates, and the full Court may admit him to the Roll of Senior Advocates, if, in its opinion, he deserves the distinction by virtue of his ability, status and reputation at the Bar, subject to his giving an undertaking that he shall not draw pleadings, affidavits, advice on evidence or do any drafting work of an analogous kind. The undertaking shall not, however, apply to settling any such matters in consultation with a Junior.

8. The Attorney-General for India, after him, the Solicitor General of India and after him the Advocate-General of a State appearing as such, shall have precedence over all other Advocates in the Court.

9. Save as aforesaid a Senior Advocate shall have precedence over other Advocates.

10. Subject to the preceding rules of this Order, an Advocate appearing before the Court shall have precedence among the Senior or other Advocates, as the case may be, according to the date of his enrolment as a Senior or other Advocate in the Court, and Advocates transferred to the Rolls of the Supreme Court from the Rolls of the Federal Court shall take precedence in the Supreme Court in the order in which they were enrolled in the Federal Court.

11. Any question which arises with respect to the precedence of any Advocate-General of a State or an Advocate shall be determined by the Court.

12. The Roll of Advocates shall be kept by the Registrar and shall contain such particulars as the Court may from time to time require.

13. All Advocates appearing before the Court shall wear such robes and costume as may from time to time be directed by the Court.

14. The enrolment fee for an Advocate other than a Senior Advocate shall be Rs. 250 and for a Senior Advocate Rs. 500.

Provided that where an Advocate of the Supreme Court is enrolled as a Senior Advocate, the fee payable by him on such enrolment shall be reduced by the amount of the original fee paid by him for his enrolment as an Advocate of the Supreme Court.

15. An Agent on the Rolls of the Court as on the 26th of January 1954, may apply for being enrolled as an Advocate if he possesses the qualifications prescribed in rule 3 but against the period of seven years' standing as an Advocate in a High Court prescribed in sub-rule (2) of the said rule, he may count in his favour any period during which he has practised as an Agent in the Supreme Court and in the Federal Court or in either of them.

Where the application of an Agent for enrolment as an Advocate is granted the fee payable by him on his enrolment as Advocate shall be reduced by the amount of fee originally paid by him for his enrolment as Agent.

16. There shall be no enrolment of Agents on and from the 26th January 1954, and, save as hereinafter provided, the roll of Agents in the Court shall stand abolished with effect from 26th February 1954 and no Agent shall be entitled on or after the 26th February 1954, to act for any party or institute any proceedings on behalf of any party in the Court by virtue of his having been an Agent on the Rolls of the Court before that date.

17. (1) In respect of proceedings pending on the 26th February 1954, the Agents on record in those proceedings, except where they have been enrolled as Advocates, may continue to act as Agents for the parties in the said proceedings after the said date and the taxation and all other rules relating to the Agents in force prior to the 26th January 1954 shall apply to such proceedings and to the Agents in such proceedings.

(2) The taxation rules in force prior to the 26th January 1954 shall also apply to all proceedings which terminated prior to 26th February 1954, and in respect of all such proceedings, the Agents concerned, notwithstanding their enrolment as Advocates, may continue to act as Agents for purposes of taxation in such proceedings.

18. Where a person who is on record as an Agent in any pending proceeding is enrolled as an Advocate, he may continue to act for the party in the said proceeding without filing a fresh authority, and may also plead if authorised by his client. Subject to the provision in sub-rule (2) of Rule 17, the taxation rules in force prior to the 26th January 1954 shall apply to the said pending proceeding in respect of all matters up to the date of the enrolment of the Agent as an Advocate and the new rules of taxation shall apply to the said proceeding in respect of all matters subsequent to the said date.

19. Any Advocate having an office in Delhi and not being a Senior Advocate, may register himself with the Registrar as an Advocate on record and on such registration, he shall be entitled to act as well as to plead for any party in a proceeding on his filing in that proceeding a memorandum of appearance accompanied by a vakalatnama duly executed by the party in the prescribed form.

No Advocate other than an Advocate on record shall be entitled to file an appearance or act for a party in the Court.

20. No Advocate other than an Advocate on record shall appear and plead in any matter unless he is instructed by an Advocate on record.

21. Every Advocate on record shall notify to the Registrar the address of his office in Delhi and any change of address, and any notice, writ, summons, or other document served on him or his clerk at the address notified by him shall be deemed to have been properly served.

22. Any Advocate on record may employ a clerk to attend the Registry for presenting or receiving any papers on behalf of the said Advocate, provided that the clerk has been duly registered in the registry as the clerk of the said Advocate. The Registrar may decline to register any clerk who in his opinion is not sufficiently qualified to be registered as such.

23. Any Advocate who wishes to suspend his practice by reason of his appointment to any office of profit under the Government or his being engaged in another profession or for any other reason shall give intimation thereof to the Registrar.

24. No person having an Advocate on record shall file a vakalatnama authorising another Advocate on record to act for him in the same case save with the consent of the former Advocate on record or by leave of the Judge in Chambers, unless the former Advocate on record is dead, or is unable by reason of infirmity of mind or body to continue to act.

25. Where a party changes his Advocate on record, the new Advocate on record shall give notice of the change to all other parties appearing.

26. No Advocate may, without the leave of the Court, withdraw from the conduct of any case by reason only of the non-payment of fees by his client.

27. No person having an Advocate on record shall be heard in person save by special leave of the Court.

28. No Advocate on record shall authorise any person whatsoever, except another Advocate on record, to act for him in any case.

29. Every Advocate on record shall be personally liable to the Court for the due payment of all fees and charges payable to the Court.

30. Where on the complaint of any person or otherwise, the Court is of opinion that an Advocate has been guilty of misconduct or of conduct unbecoming an Advocate, the Court may debar him from practising before the Court either permanently or for such period as the Court may think fit, and the Registrar shall thereupon report his name to his own High Court :

Provided that the Court shall in the first instance direct a summons to issue returnable before the Court or before a Special Bench to be constituted by the Chief Justice, requiring the Advocate to show cause against the matters alleged in the summons, and the summons shall, if possible, be served personally upon him with copies of any affidavit or statement before the Court at the time of the issue of the summons.

31. Two or more Advocates of the Court not being Senior Advocates, may enter into partnership with one another, and any one of them may act in the name of the partnership provided that the firm has an office in Delhi, and is registered with the Registrar. Any change in the composition of the firm shall be intimated to the Registrar.

32. Senior Advocates on the Rolls of the Court as on the 26th January 1954 may apply for the transfer of their names from the Roll of Senior Advocates to the Roll of Advocates, and on their application being granted, their names shall be removed from the Roll of Senior Advocates and included in the Roll of Advocates. The applicant, however, shall not be entitled to a refund of any part of the fee previously paid for his enrolment as Senior Advocate.

ORDER V

Business in Chambers

1. The powers of the Court in relation to the following matters may be exercised by the Registrar :—

(1) Applications for discovery and inspection.
(2) Applications for delivery of interrogatories.
(3) Applications for substituted service.
(4) Applications for time to plead, for production of documents, and generally relating to the conduct of cause, appeal or matter.
(5) Applications for leave to take documents out of the custody of the Court.
(6) Questions arising in connection with the payment of court-fees.
(7) Applications by third parties for return of documents.
(8) Applications for grant of copies of records to third parties.
(9) Applications for issue of a certificate regarding any excess court-fee paid under a mistake.

2. The powers of the Court in relation to the following matters may be exercised by a single Judge sitting in Chambers :—

(1) Application for revivor or substitution.
(2) Application for approval of a Translator or an Interpreter.
(3) Applications for production of documents outside Court premises.
(4) Applications for change of Advocate on record.
(5) Applications by Advocate on record for leave to withdraw.
(6) Applications for leave to compromise or discontinue pauper appeal.
(7) Applications for striking out or adding party.
(8) Applications for separate trials of causes of action.
(9) Application for separate trials to avoid embarrassment.
(10) Rejection of plaint.
(11) Applications for setting down for judgment in default of written statement.
(12) Applications for better statement of claim or defence.
(13) Applications for particulars.
(14) Applications for striking out any matter in a pleading.
(15) Applications for amendment of pleading and for enlargement of time to amend.

(16) Applications to withdraw suits.
(17) Applications for payment into Court.
(18) Applications for payment out of Court of money or security, or interest or dividend on securities.
(19) Applications to tax bills returned by the Taxing Officer.
(20) Applications for costs of taxation where one-sixth is taxed off.
(21) Applications for review of taxation by Court.
(22) Applications for enlargement or abridgement of time except applications for condonation of delay in filing special leave petitions.
(23) Applications for issue of commissions.
(24) Application for security for costs.
(25) Application for assignment of Security Bonds.
(26) Questions arising in taxation referred by the Taxing Officer.
(27) Applications for extending returnable dates of warrants.
(28) Applications for orders against clients for payment of costs.
(29) Applications for taxation and delivery of bills of costs, and for delivery by an Advocate of documents and papers.
(30) Applications for enrolment of Advocates other than Senior Advocates.
(31) Applications for leave to proceed in forma pauperis.
(32) Applications for grant of bail.
(33) Applications for stay of execution of a sentence or order in criminal proceedings.
(34) Applications for stay of execution of decree or order in civil matters during vacation.
(35) Consent applications in interlocutory matters.
(36) Applications by accused persons for engagement of Advocate under Rule 11 of Order XXI.
(37) Applications to appoint or discharge a next friend or guardian of a minor or a person of unsound mind and direct amendment of the record thereon.
(38) Fixing the remuneration of a court guardian.

3. An appeal shall lie from the Registrar in all cases to the Judge in Chambers:

Provided that it is filed within fifteen days from the date of the order complained of.

4. The Registrar may, and if so directed by the Judge in Chambers shall, at any time adjourn any matter to the Judge in Chambers, and the Judge in Chambers may at any time adjourn any matter into Court.

ORDER VI

Notices of Motion

1. Except where otherwise provided by any statute or prescribed by these Rules, all applications which in accordance with these Rules cannot be made in Chambers shall be made on motion after notice to the parties affected thereby.

2. Where the delay caused by notice would or might entail serious hardship, an application may be made for *ad-interim ex-parte* order duly supported by an affidavit

and the Court, if satisfied that the delay caused by notice would entail serious hardship, may make an order *ex parte* upon such terms as to costs or otherwise, and subject to such undertaking, if any, as the Court may think just, pending orders on the main application by notice of motion.

3. Where an *ex parte* order is made by the Court, unless the Court has fixed a date for the return of the notice, or otherwise directs, the Registrar shall fix a date for the return of the notice and the application by notice of motion shall be posted before the Court for final orders on the return date.

4. A notice of motion shall be intituled in the suit or matter in which the application is intended to be made and shall state the time and place of application and the nature of the order asked for and shall be addressed to the party or parties intended to be affected by it, unless they have an Advocate on record, in which case it may be addressed to the Advocate on record, and shall be signed by the Advocate on record of the party moving, or by the party himself where he acts in person.

5. The notice of motion together with the affidavit in support thereof shall be served on the opposite party not less than five days before the day appointed for the motion and the affidavit of service shall be filed in the Registry at least three days before the day appointed for the motion. Affidavits in answer or reply shall be filed in the Registry during office hours not later than 4 P. M. on the day preceding the day of hearing; copies of these affidavits shall be served on the other parties to the notice of motion and the affidavits shall not be accepted in the Registry unless they contain an endorsement of service signed by the other party or parties.

6. Notice shall be given to the other party or parties of all grounds intended to be urged in support of, or in opposition to, any motion.

ORDER VII

Documents

1. The officers of the Court shall not receive any pleading, petition, affidavit or other document, except original exhibits and certified copies of public documents, unless it is fairly and legibly transcribed on one side of standard petition paper, demy-foolscap size, or paper which is ordinarily used in the High Courts for transcribing such documents.

2. No document in a language other than English shall be accepted for the purpose of any proceedings before the Court, unless translated in accordance with these Rules.

3. Every document required to be translated shall be translated by a translator nominated or approved by the Court.

4. Every translator shall, before acting, make an oath or affirmation that he will translate correctly and accurately all documents given to him for translation.

5. All plaints, petitions, appeals and other documents shall be presented in person by the plaintiff, petitioner or appellant or by an Advocate of the Court duly appointed by him for the purpose.

6. The Registrar may decline to accept any document which is presented otherwise than in accordance with the Rules of the Court.

7. Except as otherwise specifically provided by these rules or by any law for the time being in force, the court-fees set out in the Third Schedule to these rules shall be payable on the documents mentioned therein, and no document chargeable with a fee under the said Schedule shall be received or filed in the Registry unless the fee prescribed has been paid on it.

ORDER VIII

AFFIDAVITS

1. The Court may at any time, for sufficient reason, order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing, on such conditions as the Court thinks reasonable :

Provided that where it appears to the Court that either party *bona fide* desires the production of a witness for cross-examination and that such witness can be produced, an order shall not be made authorising the evidence of such witness to be given by affidavit.

2. Upon any application evidence may be given by affidavit ; but the Court may, at the instance of either party, order the attendance for cross-examination of the deponent, and such attendance shall be in Court, unless the deponent is exempted from personal appearance in Court or the Court otherwise directs.

3. Every affidavit shall be intituled in the cause, appeal or matter in which it is sworn.

4. Every affidavit shall be drawn up in the first person, and shall be divided into paragraph to be numbered consecutively, and shall state the description, occupation, if any, and the true place of abode of the deponent.

5. Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications, on which statement of his belief may be admitted, provided that the grounds thereof are stated.

Verification of Affidavit : — Verification of Affidavit should invariably be modelled on the lines of O. 19, R. 3, C. P. C., whether the Code applies in terms or not. When the matter deposed to is not based on personal knowledge, the sources of information should be clearly disclosed. Where, however, the verification simply stated that everything was true to the best of the information and belief of the deponent, it was held that a slipshod verification of the type might well in a given case lead to the rejection of the affidavit. *State of Bombay* v. *Purushottam Jog Naik*, A. I. R. 1952 S. C. 317 : 1952 S. C. R. 674 : 1952 S. C. J. 503.

6. The costs occasioned by any unnecessary prolixity in the title to an affidavit or otherwise shall be disallowed by the Taxing Officer.

7. An affidavit requiring interpretation to the deponent shall be interpreted by an interpreter nominated or approved by the Court, if made within the State of Delhi, and if made elsewhere shall be interpreted by a competent person who shall certify that he has correctly interpreted the affidavit to the deponent.

8. Affidavits for the purposes of any cause, appeal or matter before the Court may be sworn before any authority mentioned in section 139 of the Code or before the Registrar of this Court, or before a Commissioner generally or specially authorised in that behalf by the Chief Justice.

9. Where the deponent is a *purdahnashin* lady she shall be identified by a person to whom she is known and that person shall prove the identification by a separate affidavit.

10. Every exhibit annexed to an affidavit shall be marked with the title and number of the cause, appeal or matter and shall be initialled and dated by the authority before whom it is sworn.

11. No affidavit having any interlineation, alteration or erasure shall be filed in Court unless the interlineation or alteration is initialled, or unless in the case of an erasure the words or figures written on the erasure are rewritten in the margin and initialled, by the authority before whom the affidavit is sworn.

12. The Registrar may refuse to receive an affidavit where in his opinion the interlineations, alterations or erasures are so numerous as to make it expedient that the affidavit should be rewritten.

13. Where a special time is limited for filing affidavits, no affidavit filed after that time shall be used except by leave of the Court.

14. In this Order "affidavit" includes a petition or other document required to be sworn and "sworn" shall include "affirmed".

ORDER IX

INSPECTION, SEARCH, ETC.

1. Subject to the provisions of these Rules, a party to any cause, appeal or matter who has appeared shall be allowed to search, inspect or get copies of all pleadings and other documents or records in the case, on payment of the prescribed fees and charges.

Prescribed fee.—The fee prescribed for every search or examination of records is Rs. 3/-—Vide Table of Court-fees Third Schedule, Part III, No. 18.

2. The Court, at the request of a person not a party to the cause, appeal or matter, may on good cause shown allow such search or inspection or grant such copies as is or are mentioned in the last preceding rule, on payment of the prescribed fees and charges.

3. A search or inspection under the last two preceding rules during the pendency of a cause, appeal or matter, shall be allowed only in the presence of an officer of the Court and after twenty-four hours' notice in writing to the parties who have appeared, and copies of documents shall not be allowed to be taken, but notes of the search or inspection may be made.

4. Copies required under any of the preceding rules of this Order may be certified as correct copies by the Registrar, Deputy Registrar, Assistant Registrar, or such other officer as may be authorised in that behalf by the Registrar.

5. No record or document filed in any cause, appeal or matter shall, without the leave of the Court, be taken out of the custody of the Court.

6. The Registrar may, in his discretion, permit any record to be sent to any Court, tribunal or other public authority on requisition received from such Court, tribunal or authority.

ORDER X

JUDGMENTS, DECREES AND ORDERS.

1. The Court, after the case has been heard, shall pronounce judgment in open Court, either at once or on some future day, of which due notice shall be given to the parties or their Advocates on record, and the decree or order shall be drawn up in accordance therewith.

2. A member of the Court may read a judgment signed by another member.

3. Subject to the provisions contained in Order XXXVIII, a judgment pronounced by the Court or by a majority of the Court or by a dissenting Judge in open Court shall not afterwards be altered or added to, save for the purpose of correcting a clerical or arithmetical mistake or an error arising from any accidential slip or omission.

4. Certified copies of the judgment, decree or order shall be furnished to the parties on requisition made for the purpose, and at their expense.

5. Every decree passed or order made by the Court shall be drawn up in the Registry and be signed by the Registrar or Deputy Registrar and sealed with the Seal of the Court and shall bear the same date as the judgment in the suit or appeal.

6. The decree passed or order made by the Court in every appeal, and any order for costs in connection with the proceedings therein, shall be transmitted by the Registrar to the Court or tribunal from which the appeal was brought, and steps for the enforcement of such decree or order shall be taken in that Court or tribunal in the way prescribed by law.

7. Orders made by the Court in other proceedings shall be transmitted by the Registrar to the Judicial or other authority concerned to whom such orders are directed, and any party may apply to the Judge in Chambers that any such order, including an order for payment of costs, be transmitted to any other appropriate Court or other authority for enforcement.

8. In cases of doubt or difficulty with regard to a decree or order made by the Court, the Registrar shall, before issuing the draft, submit the same to the Court.

9. Where the Registrar considers it necessary that the draft of any decree or order should be settled in the presence of the parties or where the parties require it to be settled in their presence, the Registrar shall, by notice in writing, appoint a time for settling the same and the parties shall attend the appointment and produce the briefs and such other documents as may be necessary to enable the draft to be settled.

10. Where any party is dissatisfied with the decree or order as settled by the Registrar, the Registrar shall not proceed to complete the decree or order without allowing that party sufficient time to apply by motion to the Court.

ORDER XI

Constitution of Division Courts

1. Subject to the other provisions of these Rules, every cause, appeal or matter shall be heard by a Bench consisting of not less than two Judges nominated by the Chief Justice.

2. Where in the course of the hearing of any cause, appeal or other proceeding, the Bench considers that the matter should be dealt with by a larger Bench, it shall refer the matter to the Chief Justice, who shall thereupon constitute such a Bench for the hearing of it.

PART II

Appellate Jurisdiction

ORDER XII

Civil Appeals

Appeals on certificate by High Court

INTRODUCTORY NOTES

Civil appeals under Articles 132 (1), 133 (1) and 135 of the Constitution (quoted in extenso in the 'Preliminary' Section of this Book) are governed by Order XLV of the Code of Civil Procedure, the provisions whereof and of any rules made for the purpose by the High Court or other authority concerned shall apply, so far as may be applicable, in relation to such

appeals. For facility of reference the said provisions are re-produced below :

"ORDER XLV (C. P. C.)

APPEALS TO THE SUPREME COURT

1. In this Order, unless there is something repugnant in the subject or context, the expression "decree" shall include a final order.

2. Whoever desires to appeal to the Supreme Court shall apply by petition to the Court whose decree is complained of.

3. (1) Every petition shall state the grounds of appeal and pray for a certificate either that, as regards amount or value and nature, the case fulfils the requirements of section 110, or that it is otherwise a fit one for appeal to the Supreme Court.

(2) Upon receipt of such petition, the Court shall direct notice to be served on the opposite party to show cause why the said certificate should not be granted.

4. For the purposes of pecuniary valuation, suits involving substantially the same questions for determination and decided by the same judgment may be consolidated: but suits decided by separate judgments shall not be consolidated, notwithstanding that they involve substantially the same questions for determination.

5. In the event of any dispute arising between the parties as to the amount or value of the subject-matter of the suit in the Court of first instance, or as to the amount or value of the subject-matter in dispute on appeal the Supreme Court, the Court to which a petition for a certificate is made under rule 2 may, if it thinks fit, refer such dispute for report to the Court of first instance, which last-mentioned Court shall proceed to determine such amount or value and shall return its report together with the evidence to the Court by which the reference was made.

6. Where such certificate is refused, the petition shall be dismissed.

7. (1) Where the certificate is granted, the applicant shall, within ninety days or such further period, not exceeding sixty days, as the Court may upon cause shown allow from the date of the decree complained of, or within six weeks from the date of the grant of the certificate, whichever is the later date,—

(a) furnish security in cash or in Government securities for the costs of the respondent, and

(b) deposit the amount required to defray the expense of translating, transcribing, indexing, printing and transmitting to the Supreme Court a correct copy of the whole record of the suit, except—

(1) formal documents directed to be excluded by any Rule of the Supreme Court in force for the time being;

(2) papers which the parties agree to exclude;

(3) accounts, or portions of accounts, which the officer empowered by the Court for that purpose considers unnecessary, and which the parties have not specifically asked to be included; and

(4) such other documents as the High Court may direct to be excluded:

Provided that the Court at the time of granting the certificate may, after hearing any opposite party who appears, order on the ground of special hardship that some other form of security may be furnished:

Provided, further, that no adjournment shall be granted to an opposite party to contest the nature of such security.

8. Where such security has been furnished and deposit made to the satisfaction of the Court, the Court shall—

(a) declare the appeal admitted,

(b) give notice thereof to the respondent,

(c) transmit the Supreme Court under the seal of the Court a correct copy of the said record, except as aforesaid, and

(d) give to either party one or more authenticated copies of any of the papers in the suit on his applying therefor and paying the reasonable expenses incurred in preparing them.

9. At any time before the admission of the appeal the Court may, upon cause shown, revoke the acceptance of any such security, and make further directions thereon.

9-A. Nothing in these rules requiring any notice to be served on or given to an opposite party or respondent shall be deemed to require any notice to be served on or given to the legal representative of any deceased opposite party or deceased respondent in a case, where such opposite party or respondent did not appear either at the hearing in the Court whose decree is complained of or at any proceedings subsequent to the decree of that Court:

Provided that notices under sub-rule (2) of rule 3 and under rule 8 shall be given by affixing the same in some conspicuous place in the Court-house of the Judge of the District in which the suit was originally brought, and by publication in such newspapers as the Court may direct.

10. Where at any time after the admission of an appeal but before the transmission of the copy of the record, except as aforesaid, to the Supreme Court, such security appears inadequate,

or further payment is required for the purpose of translating, transcribing, printing, indexing or transmitting the copy of the record, except as aforesaid,

the Court may order the appellant to furnish, within a time to be fixed by the Court, other and sufficient security, or to make, within like time the required payment.

11. Where the appellant fails to comply with such order, the proceedings shall be stayed,

and the appeal shall not proceed without an order in this behalf of the Supreme Court,

and in the meantime execution of the decree appealed from shall not be stayed.

12. When the copy of the record, except as aforesaid, has been transmitted to the Supreme Court the appellant may obtain a refund of the balance (if any) of the amount which he has deposited under rule 7.

13. (1) Notwithstanding the grant of a certificate for the admission of any appeal, the decree appealed from shall be unconditionally executed, unless the Court otherwise directs.

(2) The Court may, if it thinks fit, on special cause shown by any party interested in the suit, or otherwise appearing to the Court,—

(a) impound any moveable property in dispute or any part thereof, or

(b) allow the decree appealed from to be executed, taking such security from the respondent as the Court thinks fit for the due performance of any order which the Supreme Court may make on the appeal, or

(c) stay the execution of the decree appealed from, taking such security from the appellant as the Court thinks fit for the due performance of the decree

appealed from, or of any decree or order which the Supreme Court may make on the appeal, or

(d) place any party seeking the assistance of the Court under such conditions or give such other direction respecting the subject-matter of the appeal, as it thinks fit, by the appointment of a receiver or otherwise.

14. (1) Where at any time during the pendency of the appeal the security furnished by either party appears inadequate, the Court may, on the application of the other party, require further security.

(2) In default of such further security being furnished as required by the Court,—

(a) if the original security was furnished by the appellant, the Court may, on the application of the respondent, execute the decree appealed from as if the appellant had furnished no such security;

(b) if the original security was furnished by the respondent, the Court shall, so far as may be practicable, stay the further execution of the decree, and restore the parties to the position in which they respectively were when the security which appears inadequate was furnished, or give such direction respecting the subject-matter of the appeal as it thinks fit.

15. (1) Whoever desires to obtain execution of any decree or order of the Supreme Court shall apply by petition, accompanied by a certified copy of the decree passed or order made in appeal and sought to be executed, to the Court from which the appeal to the Supreme Court was preferred.

(2) Such Court shall transmit the decree or order of the Supreme Court to the Court which passed the first decree appealed from, or to such other Court as the Supreme Court by such decree or order may direct, and shall (upon the application of either party) give such directions as may be required for the execution of the same; and the Court to which the said decree or order is so transmitted shall execute it accordingly, in the manner and according to the provisions applicable to the execution of its original decrees.

* * * *

(4) Unless the Supreme Court otherwise directs, no decree or order of that Court shall be inoperative on the ground that no notice has been served on or given to the legal representative of any deceased opposite party or deceased respondent in a case, where such opposite party or respondent did not appear either at the hearing in the Court whose decree was complained of or at any proceedings subsequent to the decree of that Court, but such order shall have the same force and effect as if it had been made before the death took place.

16. The orders made by the Court which executes the decree or order of the Supreme Court, relating to such execution, shall be appealable in the same manner and subject to the same rules as the orders of such Court relating to the execution of its own decrees."

N. B.—For Local Amendments please consult Amendments made by various High Courts.

Amount of security referred to in O. 45, R. 7 (1) (a) of the Civil P. C. — The amount of security to be deposited has now been fixed at Rs. 2500. The Court appealed from may, however, in appropriate case, enhance the amount upto Rs. 5000. The failure to deposit the security or make the deposit as required by clauses (a) and (b) of Rule 7 (1) of O. 45, C. P. C. by an appellant, who has obtained a certificate from the High Court, renders the certificate liable to cancellation. The said Court may, however, give such directions as to the costs of the appeal and the security entered into by the appellant as it

shall think fit or make such further or other order as the justice of the case requires.

Withdrawal of appeal by the Appellant:—An appellant may withdraw his appeal at any time before it is admitted on such terms as to costs and otherwise as the High Court may direct. He may also, before the despatch of record to the Supreme Court withdraw his appeal and the costs of appeal and the security entered into by the appellant shall, in that case, be dealt with in such manner and as the High Court may think fit to direct.

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1. Subject to any special directions which the Court may give in any particular case, the provisions of Order XLV of the Code, and of any rules made for the purpose by the High Court or other authority concerned, so far as may be applicable, shall apply in relation to appeals preferred under Articles 132 (1), 133 (1) and 135 of the Constitution.

1A. The security to be furnished under Order XLV, Rule 7 (1) (a) of the Code shall, unless otherwise ordered by the Court appealed from, be in the sum of Rs. 2,500. The Court appealed from may in appropriate cases enhance the amount of security to be deposited up to a maximum of Rs. 5,000.

2. An appellant who has obtained a certificate from the High Court may, at any time prior to the making of an order admitting the appeal, withdraw the appeal on such terms as to costs and otherwise as the High Court may direct.

3. Where an appellant, having obtained a certificate from the High Court, fails to furnish the security or make the deposit required, that Court may, on its own motion or on application in that behalf made by the respondent, cancel the certificate and may give such directions as to the costs of the appeal and the security entered into by the appellant as it shall think fit or make such further or other order as the justice of the case requires.

4. Where an appellant whose appeal has been admitted desires, prior to the dispatch of the Record to this Court, to withdraw his appeal, the High Court may, upon an application in that behalf made by the appellant, grant him a certificate to the effect that the appeal has been withdrawn, and the appeal shall thereupon be deemed, as from the date of such certificate, to stand dismissed without an express order of this Court, and the costs of the appeal and the security entered into by the appellant shall be dealt with in such manner as the High Court may think fit to direct.

5. Where an appellant whose appeal has been admitted fails to show due diligence in taking all necessary steps in connection with the preparation of the Record, the High Court may, either on its own motion, or on the application of the respondent, call upon the appellant to show cause why a certificate should not be issued that the appeal has not been effectually prosecuted by the appellant, and if the High Court sees fit to issue such a certificate, the appeal shall be deemed, as from the date of such certificate, to stand dismissed for non-prosecution without an express order of this Court, and the costs of the appeal and the security entered into by the appellant shall be dealt with in such manner as the High Court thinks fit to direct.

6. Where there are two or more appeals arising out of the same matter, and the High Court is of the opinion that it would be for the convenience of this Court and all parties concerned that the appeals should be consolidated, the High Court may direct the appeals to be consolidated and make such order for security of costs as the justice of the case requires.

7. The liability of the parties to pay court-fee in this Court, unless otherwise ordered by this Court, shall not be affected by any order for consolidation of appeals made by the High Court or by this Court.

ORDER XIII

APPEALS BY SPECIAL LEAVE

INTRODUCTORY NOTES.

Condition precedent to application for special leave. — No application for special leave to appeal shall be entertained by the Supreme Court, unless the High Court or the Tribunal has first been moved and it has refused to grant the certificate, except when the appeal does not lie to the Supreme Court on such certificate.

Limitation. — The time fixed for lodging a petition for special leave is now 60 days from the date of the refusal of leave to appeal by the High Court, or, in case the appeal does not lie to the Supreme Court on a certificate issued by the High Court or the Tribunal concerned, 90 days from the date of judgment or order sought to be appealed.

Documents to be filed in special leave petition. — (i) Petition stating succinctly and clearly all necessary facts and stating further whether the petitioner has moved the High Court or Tribunal concerned for leave to appeal, and, if so, with what result, signed by the advocate for the petitioner, unless the petitioner appears in person.

(ii) Affidavit prescribed by O. XVII, R. 4.

(iii) A certified copy of the judgment or order appealed from.

(iv) And at least seven copies of the petition and the accompanying papers.

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1. A petition for special leave to appeal shall be lodged in the Court within sixty days from the date of the refusal of leave to appeal by the High Court or within ninety days from the date of the judgment or order sought to be appealed from :

Provided that in computing the period, the time requisite for obtaining a copy of the judgment or order sought to be appealed from shall be excluded :

Provided further that the Court may for sufficient cause extend the time on application made for the purpose.

2. Where an appeal lies to the Supreme Court on a certificate issued by the High Court or other Tribunal no application to the Supreme Court for special leave to appeal shall be entertained unless the High Court or the Tribunal concerned has first been moved and it has refused to grant the certificate.

3. The petition shall state succinctly and clearly all such facts as it may be necessary to state in order to enable the Court to determine whether special leave to appeal ought to be granted and shall be signed by the Advocate for the petitioner unless the petitioner appears in person. The petition shall also state whether the petitioner has moved the High Court or Tribunal concerned for leave to appeal against its decision, and if so, with what result.

4. The petition shall be accompanied by a certified copy of the judgment or order appealed from and the affidavit in support thereof prescribed by Rule 4 Order XVII, and the petitioner shall lodge at least seven copies of the petition and the accompanying papers.

5. Unless a caveat as prescribed by Rule 2 of Order XVII has been lodged by the other parties who appeared in the Court below, petitions for grant of special leave to appeal shall be put up for hearing *ex parte* but the Court may, if it thinks fit, direct the petitioner to issue notice to the respondent and adjourn the hearing of the petition. Where the Court orders notice, the petition shall be posted for hearing after service of notice on the respondent and on an affidavit of service being duly filed by the petitioner.

Where a caveat has been lodged as aforesaid, notice of the hearing of the petition shall be given to the caveator; but a caveator shall not be entitled to costs of the petition, unless the Court otherwise orders.

6. In urgent cases, when the Court is in vacation, an application for special leave to appeal may be heard and disposed of by a single Judge.

7. Where the Court grants special leave to appeal, it may in its order specify the amount of the security for costs (if any) to be lodged by the petitioner, up to a maximum of Rs. 5,000 and the time within which such security is to be lodged, and, unless the circumstances of a particular case render such a course unnecessary, provide for the expeditious transmission of the printed record by the Registrar of the Court concerned or by other authority, to the Registrar of this Court, and for such further matters as the justice of the case may require. Unless the Court specially directs otherwise, any security for costs to be furnished by the petitioner shall be in the sum of Rs. 2,500 in cash or Government securities and shall be lodged in the Court or tribunal from whose judgment or decision special leave to appeal has been granted within six weeks of the date of the order granting special leave and that Court or tribunal shall deal with such security in accordance with the directions contained in the order of the Court when determining the appeal.

8. After the grant of special leave to appeal by the Court, the Registrar shall transmit a certified copy of the order to the Court or tribunal appealed from.

9. On receipt of the said order, the Court or tribunal appealed from shall, in the absence of any special directions in the order, act in accordance with the provisions contained in Order XLV of the Code, so far as applicable.

10. Where an appellant who has obtained special leave to appeal desires, prior to the despatch of the record to this Court, to withdraw his appeal, the High Court may, upon an application in that behalf made by the appellant, grant him a certificate to the effect that the appeal has been withdrawn and the appeal shall thereupon be deemed as from the date of such certificate to stand dismissed without an express order of this Court and the costs of the appeal and the security entered into by the appellant shall be dealt with in such manner as the High Court may think fit to direct. A copy of the said certificate shall be forwarded to the Registrar of this Court.

11. Where the security is to be deposited in the Court appealed from, the Registrar of the Court appealed from shall, as soon as the deposit is made, intimate the fact and the date of such deposit to the Registrar of this Court; where the deposit is not made within the time fixed, or within such further time as may be granted by this Court, the Registrar of the Court appealed from shall forthwith report the default to the Registrar of this Court.

12. Upon intimation from the Registrar of the Court appealed from that the petitioner has committed default in depositing the security, or, where the security is to be deposited in this Court, upon default of the petitioner in depositing the same within the time fixed or such further time as the Court may grant, the Registrar shall, after notice to the Advocate for the petitioner, post the matter before the Court for orders on the default of the petitioner in lodging security, and the Court may thereupon revoke the order granting special leave or make such other order as it thinks fit.

13. Where the appellant who has obtained special leave to appeal by an order of this Court, fails to have the printed Record transmitted to the Registrar with due diligence, the Registrar shall call upon the appellant to explain his default, and, if no explanation is offered, or if the explanation offered is, in the opinion of the said Registrar, insufficient, the said Registrar may issue a summons to the appellant calling upon him to show cause before this Court at a time to be specified in the said summons why the special leave to appeal should not be rescinded. The respondent shall be entitled to be heard

before this Court in the matter of the said summons and to ask for his costs and such other relief as he may be advised. The Court may, after considering the matter of the said summons, rescind the grant of special leave to appeal, or give such other directions as the justice of the case may require.

14. Where security is required to be furnished in this Court, it shall be given to the Registrar or to such other officer as the Court may specially direct, and the Court may permit or order him to assign the same to any other person for the purpose of enforcing it upon such terms as the Court may think fit.

15. Where the appellant has lodged security for the respondent's costs of an appeal in the Registry, the Registrar shall deal with such security in accordance with the directions contained in the Court's order determining the appeal.

16. Save as otherwise provided by the rules contained in this Order, the provisions of Order XII and Orders XV to XX shall apply *mutatis mutandis* to appeals by special leave.

ORDER XIV

Pauper Appeals and Applications

1. A petition for leave to proceed as a pauper shall be made to the Judge in Chambers.

2. An application for leave to proceed as a pauper shall be made on petition setting out concisely in separate paragraphs the facts of the case and the relief sought and shall be accompanied by a copy of the certificate granting leave to appeal or of the petition for special leave to appeal, as the case may be, and by an affidavit from the petitioner disclosing all the property to which he is entitled and the value thereof other than his necessary wearing apparel and his interest in the subject matter of the intended appeal, and stating that he is unable to provide sureties and pay court-fees, and also by a certificate of counsel that the petitioner has reasonable ground of appeal.

3. The Registrar shall, on satisfying himself that the petition is in order, direct that the petition shall be filed and set down for hearing before the Chamber Judge on a date to be fixed for the purpose.

4. The application shall be posted before the Judge in Chambers who may himself enquire into the pauperism of the petitioner after notice to the other parties in the case and to the Attorney-General or make an order directing the High Court either by itself or by a Court subordinate to the High Court, to investigate the pauperism after notice to the parties interested and submit a report thereon within such time as may be fixed by the order. On receipt of the report, the petition shall again be posted before the Judge in Chambers for further orders.

5. In granting or refusing leave to appeal as a pauper, the Court shall ordinarily follow the principle set out in the proviso to Rule 1 of Order XLIV of the Code.

6. Where a petitioner obtains leave of the Court to appeal as a pauper he shall not be required to pay court-fees or to lodge security for the costs of the respondent.

7. No fees shall be payable by a pauper to his Advocate nor shall any such fees be allowed on taxation of costs against the other party except by an order of the Court.

8. Where the appellant succeeds in the appeal, the Registrar shall calculate the amount of court-fees which would have been paid by the appellant if he had not been permitted to appeal as a pauper and incorporate it in the decree or order of the Court; such amount shall be recoverable by the Government of India from any party ordered by the Court to pay the same, and shall be the first charge on the subject matter of the appeal.

9. Where the appellant fails in the appeal or is dispaupered, the Court may order the appellant to pay the court-fees which would have been paid by him if he had not been permitted to appeal as a pauper.

10. The Central Government shall have the right at any time to apply to the Court to make an order for the payment of court-fees under rules 8 and 9 above.

11. All matters arising between the Central Government and any party to the appeal under the three preceding rules shall be deemed to be questions arising between the parties to the appeal.

12. In every pauper appeal the Registrar shall, after the disposal thereof, send to the Attorney-General for India a memorandum of the court-fees payable by the pauper.

13. No appeal begun or carried on by a pauper appellant shall be compromised or discontinued without the leave of the Court.

ORDER XV

Preparation of Record, etc.

1. As soon as the appeal has been admitted, whether by an order of the court appealed from or by an order of this Court granting special leave to appeal, the appellant shall, without delay, take all necessary steps to have the printed Record transmitted to the Registrar of this Court, and the Registrar of the Court appealed from shall, with all convenient speed, certify to the Registrar of this Court that the respondent has received notice, or is otherwise aware, of the order of the court appealed from admitting the appeal, or of the order of this Court giving the appellant special leave to appeal.

2. Where the record has been printed for the purpose of the High Court appeal in the High Court concerned and sufficient number of copies of the printed record are available for purposes of the Supreme Court appeal, no fresh printing of the record shall be necessary except of such additional papers as may be required.

3. In cases where the record is printed afresh for the purpose of the Supreme Court appeal the Registrar of the Court appealed from, as well as the parties shall endeavour to exclude from the Record all documents (more particularly such as are merely formal) that are not relevant to the subject matter of the appeal, and, generally, to reduce the bulk of the Record as far as practicable, taking special care to avoid the duplication of documents and the unnecessary repetition of headings and other merely formal parts of documents; but the documents omitted to be printed shall be enumerated in a typewritten list to be transmitted with the Record.

3A. Wherever the decision of the appeal is likely to turn exclusively on a question of law, the appellant may, with the sanction of the court appealed from print such parts only of the Record as may be necessary for the discussion of the same.

4. Where in the course of the preparation of a Record one party objects to the inclusion of a document on the ground that it is unnecessary or irrelevant and the other party nevertheless insists upon its being included, the Record, as finally printed shall, with a view to the subsequent adjustment of the costs of and incidental to such document, indicate, in the index of papers, or otherwise the fact that and the party by whom, the inclusion of the document was objected to.

5. In cases where the record is printed afresh for the purpose of the Supreme Court appeal the Record shall be prepared and printed under the supervision of the court appealed from in accordance with the rules contained in the First Schedule hereto, and the parties may submit any disputed question arising in connection therewith to the decision of that court, and it shall give such directions thereon as the justice of the case may require.

6. When the Record has been made ready, the Registrar of the court appealed from shall—

(i) at the expense of the appellant transmit to the Registrar of this Court such number of copies as the Court may direct, or in the absence of any special direction in this behalf, 20 copies of such Record, one of which copies he shall certify to be correct by signing his name on, or initialling every eighth page thereof and by affixing thereto the Seal of the court appealed from;

(ii) give notice of the despatch of the Record to the parties; and

(iii) send to the Registrar of this Court a certificate as to the date or dates on which the notice under the preceding sub-clause (ii) has been served.

7. As soon as the Record is received in the Registry of this Court, it shall be registered in the said Registry with the date of arrival, and the names of the parties. Appeals shall be numbered consecutively in each year in the order in which the Records are received in the Registry.

8. The parties shall be entitled to inspect the Record and to extract all necessary particulars therefrom for the purpose of entering an appearance.

9. Each party who has entered an appearance shall be entitled to receive, for his own use, three copies of the Record.

10. Subject to any special direction from the Court to the contrary, the costs of, and incidental to, the printing of the Record shall form part of the costs of the appeal, but the costs of, and incidental to, the printing of any document objected to by one party, in accordance with rule 4 above, shall, if such document is found, on the taxation of costs to be unnecessary or irrelevant, be disallowed to, or borne by, the party insisting on including the same in the Record.

ORDER XVI

APPELLANT'S APPEARANCE AND LODGING OF PETITION OF APPEAL

INTRODUCTORY NOTES

Principal Steps to be taken by the appellant,—

(i) He shall first of all enter his appearance before taking any steps in the prosecution of his appeal [Rule 1].

(ii) He shall thereafter lodge his petition of appeal within 30 days from the date of service of notice of despatch of the record by the Registrar of the Court appealed from [Rule 2]. The said petition shall contain only the history of the case in chronological order succinctly of the principal steps in the proceeding from the commencement thereof down to the admission of appeal, but shall not contain argumentative matter or travel into the merits of the case. The particulars as to how the valuation of the appeal has been arrived at should also be stated, and where it is incapable of any valuation, it shall be so stated [Rule 3].

(iii) He shall, after lodging his petition of appeal, serve a copy thereof without delay on the respondent, endorsing such copy with the date of lodgment [Rule 5].

Court Fee on Petition of Appeal:—The court-fee on a petition for lodging and registering of appeal is Rs. 250/- upto the valuation of Rs. 20000/- and thereafter Rs. 5/- for every additional valuation of Rs. 1000/- or part

thereof, provided that the maximum fee payable in any case shall not exceed Rs. 2000.

Where, however, the appeal is brought by special leave granted by the Supreme Court, credit shall be given to the appellant for the amount of court-fee paid by him on the petition for special leave to appeal.

In cases, where it is not possible to estimate, at a money value, the subject-matter in dispute, court-fee for appeal has been fixed at Rs. 250/- [Vide Third Schedule, Part II].

Steps to be taken by the Respondent.— The respondent may enter his appearance at any time between the transmission of the Record and the expiry of the period fixed for lodging his statement of case (i. e. four weeks of the service of the petition of the appeal). Two or more respondents may, at their own risk as to costs, enter separate appearances in the same appeal [Rule 19].

(i) Failure to enter appearance will disentitle him to receive any notices relating to the appeal from the Registrar Supreme Court also to lodge his case in the appeal [Rules 16 & 20].

(ii) He shall forthwith, after entering an appearance, give notice thereof to the appellant [Rule 17].

(iii) He shall lodge his case within a four weeks of the service of the petition of appeal [Vide Order XVIII, Rule 2].

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1. The appellant shall enter an appearance before taking any step in the prosecution of the appeal.

2. The appellant shall lodge his petition of appeal within a period of thirty days from the date of the service of notice of despatch of the Record by the Registrar of the Court appealed from.

3. The petition of appeal shall be lodged in the form prescribed by Rule 1 of Order XVII hereinafter contained. It shall recite succinctly and, as far as possible, in chronological order, the principal steps in the proceedings leading up to the appeal, from the commencement thereof down to the admission of the appeal, but shall not contain argumentative matter or travel into the merits of the case. It shall contain at the foot of it a memorandum of valuation of the appeal with particulars showing how the valuation has been arrived at. Where the appeal is incapable of valuation, it shall be so stated.

4. Where a party desires to appeal on grounds which can be raised only with the leave of the Court, the petition of appeal shall be accompained by a separate petition indicating the grounds so proposed to be raised and praying for leave to appeal on those grounds and the petition shall, unless the Court otherwise directs, be heard at the same time as the appeal.

5. The appellant shall, after lodging his petition of appeal, serve a copy thereof without delay on the respondent, and shall endorse such copy with the date of lodgment :

Provided that the Registrar may dispense with service of the petition of appeal on any respondent who was *ex parte* in the proceedings in the Court appealed from or on his legal representative :

Provided however that an order dispensing with service shall not preclude any respondent or his legal representative from appearing to contest the appeal.

6. Where an appellant who has not lodged his petition of appeal desires to withdraw his appeal, he shall make an application to that effect to the Registrar and thereupon the Registrar shall, with all convenient speed, certify to the Registrar of the Court appealed from that the appeal has been withdrawn. The said appeal shall thereupon be

deemed to stand dismissed as from the date of the said certificate without an express order of the Court and the costs of the appeal and the security entered into by the appellant shall be dealt with in such manner as the Court appealed from may think fit to direct.

7. Where an appellant, who has lodged his petition of appeal, desires to withdraw his appeal, he shall present a petition to that effect to the Court. On the hearing of any such petition a respondent may apply to the Court for his costs.

NON-PROSECUTION OF APPEAL : CHANGE OF PARTIES

8. If an appellant fails to take any steps in the appeal within the time fixed for the same by these Rules, or, if no time is specified, it appears to the Registrar that he is not prosecuting his appeal with due diligence, the Registrar shall call upon him to explain his default and, if no explanation, or no explanation which appears to the Registrar to be sufficient, is offered, he may issue a summons calling upon him to show cause to the Court why the appeal should not be dismissed for want of prosecution.

9. The Registrar shall send a copy of the summons mentioned in the last specified rule to every respondent who has entered an appearance.

10. The Court may, after hearing the parties, dismiss the appeal for non-prosecution or give such other directions thereon as the justice of the case may require.

11. An appellant whose appeal has been dismissed for non-prosecution may within thirty days of the order, present a petition praying that the appeal may be restored and the Court may, after giving notice of such application to the respondent, who had entered appearance in the appeal, restore the appeal if good and sufficient cause is shown putting the appellant on terms as to costs or otherwise as it thinks fit or pass such other order as the circumstances of the case and the ends of justice may require.

12. Where at any time between the admission of an appeal and the despatch of the Record to this Court, the Record becomes defective by reason of the death or change of status, of a party to the appeal, or for any other reason, the Court appealed from may, notwithstanding the admission of the appeal, on an application in that behalf made by any person interested, grant a certificate showing who, in the opinion of the said Court, is the proper person to be substituted or entered on the Record in place of, or in addition to the party on record, and the name of such person shall thereupon be deemed to be so substituted or entered on the Record as aforesaid without express order of this Court.

13. Where the Record subsequent to its despatch to this Court becomes defective by reason of the death, or change of status, of a party to the appeal, or for any other reason, the Court appealed from shall, upon an application in that behalf made by any person interested, cause a certificate to be transmitted to the Registrar of this Court showing who, in the opinion of the Court appealed from, is the proper person to be substituted, or entered on the Record, in place of, or in addition to, the party on record.

14. An application to bring on record the legal representative of a deceased appellant or respondent shall be made within sixty days of the death of the said appellant or respondent.

14A. The provisions of Order XXII of the Code relating to abatement shall, so far as may be applicable, apply to appeals in the Court.

15. A petition for an Order of Reviver or Substitution shall be accompanied by a certificate from the court appealed from showing who, in the opinion of the said court, is the proper person to be substituted, or entered, on the Record in place of, or in addition to, the party on record.

Appearance by Respondent

16. The respondent may enter an appearance at any time between the transmission of the Record by the Court appealed from and the expiry of the period fixed for lodging his statement of case.

17. The respondent shall forthwith after entering an appearance give notice thereof to the appellant.

18. Where there are two or more respondents, and only one, or some, of them enter an appearance, the Appearance Form shall set out the names of the appearing respondents.

19. Two or more respondents may, at their own risk as to costs, enter separate appearances in the same appeal.

20. A respondent who has not entered an appearance shall not be entitled to receive any notices relating to the appeal from the Registrar of the Court, nor be allowed to lodge a Case in the appeal.

ORDER XVII

Petitions Generally

1. All petitions shall consist of paragraphs numbered consecutively and shall be fairly and legibly written, typewritten or lithographed on one side of standard petition paper, demy foolscape size, or on paper ordinarily used in High Courts for transcribing petitions, with quarter margin, and endorsed with the name of the court appealed from, the full title and Supreme Court number of the appeal to which the petition relates, or the full title of the petition (as the case may be) and the name and address of the Advocate on record (if any) of the petitioner or of the petitioner where the petitioner appears in person. The petitioner shall file along with his petition such number of copies thereof as may be required for the use of the Court.

2. Where a petition is expected to be lodged, or has been lodged, which does not relate to any pending appeal of which the Record has been registered in the Registry of this Court, any person claiming a right to appear before this Court on the hearing of such petition may lodge a Caveat in the matter thereof, and shall thereupon be entitled to receive from the Registrar notice of the lodging of the petition, if at the time of the lodging of the Caveat such petition has not yet been lodged, and, if and when the petition has been lodged, to require the petitioner to serve him with copy of the petition and to furnish him, at his own expense, with copies of any papers lodged by the petitioner in support of his petition. The Caveator shall forthwith, after lodging his Caveat, give notice thereof to the petitioner, if the petition has been lodged.

3. Where a petition is lodged in the matter of any pending appeal of which the Record has been registered in the Registry of this Court, the petitioner shall serve any party who has entered an appearance in the appeal with a copy of such petition and the party so served shall thereupon be entitled to require the petitioner to furnish him at his own expense, with copies of any papers lodged by the petitioner in support of his petition.

4. A petition not relating to any appeal of which the Record has been registered in the Registry of this Court, and any other petition containing allegations of fact which cannot be verified by reference to the registered Record or any certificate or duly authenticated statement of the court appealed from shall be supported by affidavit. Where the petitioner prosecutes his petition in person, the said affidavit shall be sworn to by the petitioner himself and shall state that, to the best of the deponent's knowledge, information and belief, the allegations contained in the peti-

tion are true. Where the petitioner is respresented by an Advocate, the said affidavit may be sworn to by petitioner or, where he is for any reason unable to do so, by some person on his behalf acquainted with the facts.

5. The Registrar may refuse to receive a petition on the grounds that it discloses no reasonable cause of appeal, or is frivolous, or contains scandalous matter but the petitioner may appeal, by way of motion, from such refusal to the Court.

6. As soon as a petition and all necessary documents are lodged, the petition shall thereupon be deemed to be set down.

7. Subject to the provisions of the next following rule, the Registrar shall, as soon as the Court has appointed a day for the hearing of a petition, notify all parties concerned of the day so appointed.

8. Where the prayer of a petition is consented to in writing by the opposite party, or where a petition is of a formal and non-contentious character, the Court may, if it thinks fit, make an order thereon, without requiring the attendance of the parties and the Registrar shall not in any such case issue notice as provided by the last preceding rule, but shall, with all convenient speed, after the Court has made its order, notify the parties that the order has been made and of the date and nature of such order.

9. A petitioner who desires to withdraw his petition shall give notice in writing to that effect to the Registrar. Where the petition is opposed, the opponent shall, subject to any agreement between the parties to the contrary, be entitled to apply to the Court for his costs, but where the petition is unopposed, or where, in the case of an opposed petition, the parties have come to an agreement as to the costs of the petition, the petition may, if the Court think fit, be disposed of in the same way *mutatis mutandis* as a Consent Petition under the provisions of the last preceding rule.

10. Where a petitioner unduly delays bringing a petition to a hearing, the Registrar shall call upon him to explain the delay, and if no explanation is offered or if the explanation offered is, in the opinion of the Registrar, insufficient, the Registrar may, after notifying all parties, who have entered appearance, place the petition before the Court for such directions as the Court may think fit to give thereon.

11. At the hearing of a petition not more than one counsel shall be heard on one side.

ORDER XVIII

Lodging of Case and Subsequent Proceedings

1. No party to an appeal shall be entitled to be heard by the Court unless he has previously lodged his Case in the appeal; nor shall he be allowed to inspect the Case of the opposite party or obtain a copy thereof from the Registry until he has lodged his own Case:

Provided that where a respondent who has entered an appearance does not desire to lodge a Case in the appeal, he may give the Registrar of the Court notice in writing of his intention not to lodge any Case, while reserving his right to address the Court on the question of costs.

2. The appellant shall lodge his case within four weeks of his lodging the petition of appeal and the respondent shall lodge his case within four weeks of the service of the petition of appeal. Each party shall lodge not less than eight copies of his Case, printed or neatly typed with quarter margin, on one side of paper of the same size and quality as that used in the printing of the Record in the court below.

3. The case shall consist of paragraphs numbered consecutively and shall state, as concisely as possible, the circumstances out of which the appeal arises, the contentions to be urged by the party lodging the same, and the reasons of appeal. References by page and line to the relevant portions of the Record as printed shall, so far as practicable, be printed or typed in the margin, and care shall be taken to avoid, as far as possible, the reproducing in the Case of long extracts from the Record. The Taxing Officer in taxing the costs of the appeal shall, either of his own motion, or at the instance of the opposite party enquire into any unnecessary prolixity in the Case, and shall disallow the costs occasioned thereby.

4. Two or more respondents may, at their own risk as to costs, lodge separate Cases in the same appeal.

5. Each party shall, after lodging his Case, forthwith give notice thereof to the other party.

6. The appeal shall be set down one month after the expiry of the time prescribed for lodging the statement of cases, by the parties. Where any party fails to lodge the statement of case within the time prescribed, the appeal shall, subject to the provision in the proviso to rule 1, be set down *ex parte* against the party in default unless the Court condones the delay and grants further time to the party for lodging his case, in which case the appeal shall be set down after the expiry of the said further time.

7. Parties who have filed their cases shall exchange them; by handing one another, three copies of their respective cases.

8. As soon as an appeal is set down, the appellant shall attend at the Registry and obtain eight copies of the record and Cases to be bound for the use of the Court at the hearing. The copies shall be bound in cloth or in one-fourth leather with paper sides, and six leaves of blank paper shall be inserted before the appellant's case. The front cover shall bear a printed label stating the title and Supreme Court number of the appeal, the contents of the volume, and the name and address of the Advocates on record. The several documents, indicated by incuts, shall be arranged in the following order :

1. Appellant's case;
2. Respondent's case;
3. Record (if in more than one part, showing the separate parts by incuts, all parts being paged at the top of the page);
4. Supplemental Record (if any); and the short title and Supreme Court number of appeal shall also be shown on the back.

9. The appellant shall lodge the bound copies not less than ten clear days before the date fixed for the hearing of the appeal.

ORDER XIX

Hearing of Appeals

1. All appeals filed in the Registry shall, as far as possible, be heard in the order in which they are set down.

2. The Registrar shall, subject to the provisions of rule 20 of Order XVI, notify the parties to the appeal of the day fixed for the hearing.

3. Subject to the directions of the Court, at the hearing of an appeal not more than two advocates shall be heard on one side.

4. The appellant shall not, without the leave of the Court, rely at the hearing on any grounds not specified in the statement of the case filed by him.

5. Where the Court, after hearing an appeal, decides to reserve its judgment thereon, the Registrar shall notify the parties through their Advocates on record of the day appointed by the Court for the delivery of the judgment.

6. A respondent may within the time limited for appearance deliver to the Registrar and to the appellant a notice in writing consenting to the appeal, and the Court may thereupon if it thinks fit, make an order upon the appeal without requiring the attendance of the person so consenting.

ORDER XX

Miscellaneous

1. The filing of an appeal shall not prevent execution of the decree or order appealed against but the Court may, subject to such terms and conditions as it may think fit, impose, order a stay of execution of the decree or order, or order a stay of proceedings, in any case under appeal to the Court.

2. A respondent may apply for the summary determination of an appeal on the ground that it is frivolous or vexatious or brought for the purpose of delay, and the Court may make such order thereon as it thinks fit.

3. A party to an appeal who appears in person shall furnish the Registrar with an address for service and all documents left at that address, or sent by registered post to that address, shall be deemed to have been duly served.

ORDER XXI

Special Leave Petitions in Criminal Proceedings and Criminal Appeals

INTRODUCTORY NOTES

The provisions of Order XIII apply *Mutatis Mutandis* to application for special leave in Criminal matters, except to the extent provided in this Order e. g. provisions as to limitations in case of death sentence and Court-fee etc. etc.

Limitation For Special Leave Petition in Criminal Appeals: In case of sentence of death, petition for Special Leave to appeal shall be lodged in the Supreme Court within 30 days from the date of refusal of a certificate by the High Court or within 30 days from the date of judgment, final order or sentence sought to be appealed from. A Petition for Special Leave to appeal in a case not involving death sentence may, however, be filed within 60 days from the date of the refusal of leave to appeal by the High Court or within 90 days from the date of the judgment or order sought to be appealed as provided by O. 13, R. 1 of these Rules.

Supreme Court may, however, in either case (whether appeal involves a sentence of death or not), on sufficient cause shown, extend the period of limitation.

Time For Lodging Criminal Appeals: Criminal Appeals under Articles 132 (1) and 134 (1) (c) of the Constitution shall be lodged in the Supreme Court within 30 days from the date of the certificate granted by the High Court, and all appeals under Article 134 (1) (a) and (b) of the Constitution or under any other provision of law shall be lodged within 30 days from the date of judgment, final order or sentence.

In computing the period of 30 days in all such cases, the time requisite for obtaining copies of the judgment or order under appeal or the certificate shall be excluded. The Supreme Court may also, for sufficient cause shown, extend the time.

Special Exemptions in Case of Criminal proceedings: Criminal Appeals stand on a special footing, in so far as such appeals enjoy the following exemptions (not available in the case of Civil Proceedings) :

(1) In Criminal Proceedings no security for costs is required to be deposited.

(2) No Court-fee, process fee or search fee shall be charged.

(3) Nor are copying charges levied except for copies other than the first, and

(4) It is not necessary to file a statement of case in Criminal Appeals, though the provisions of Order XII are applicable to such appeals so far as it may be, with necessary modifications and adaptations.

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1. Save as hereinafter provided, the provisions contained in Order XIII in relation to applications for special leave to appeal in Civil Proceedings shall apply *mutatis mutandis* to applications for special leave to appeal in criminal matters.

2. A petition for special leave to appeal in a case involving a sentence of death shall be lodged in the Court within thirty days from the date of the refusal of a certificate by the High Court or within thirty days from the date of the judgment, final order or sentence sought to be appealed from, as the case may be:

Provided that the Court may for sufficient cause shown extend the time.

3. Where the petitioner is in jail he may present his petition for special leave to appeal, together with the accompanying documents, including any written arguments which he may desire to advance to the officer-in-charge of the jail, who shall forthwith forward the same to the Registrar.

4. As soon as practicable, the Registrar shall place the petition and the accompanying documents so received before the Court, and the Court may, upon perusal of the papers, reject the petition summarily without hearing the petitioner in person, if it considers that there is no sufficient ground for granting leave to appeal :

Provided that whether the petitioner is represented by counsel of his choice or by an *amicus curiae* assigned to him by the Court, the Court shall not dismiss the petition without hearing the counsel or the *amicus curiae*, as the case may be.

5. All criminal appeals under Articles 132 (1) and 134 (1) (c) of the Constitution shall be lodged in this Court within thirty days from the date of the certificate granted by the High Court, and all appeals under Article 134 (1) (a) and (b) of the Constitution or under any other provision of law within thirty days from the date of the judgment, final order or sentence appealed from:

Provided that in computing the period, the time requisite for obtaining a copy of the judgment or order sought to be appealed from or of the certificate shall be excluded :

Provided further that the Court may for sufficient cause shown extend the time.

6. The appeal shall be in the form of a petition in writing, which shall be accompanied by a certified copy of the judgment or order appealed against and of the certificate.

7. The appellant if he is in jail, may present his petition of appeal and the accompanying documents, including any written arguments which he may desire to

advance, to the officer-in-charge of the jail, who shall forward them forthwith to the Registrar.

8. On receipt of the petition of appeal, the Registrar shall cause notice of the appeal to be given, where the appeal is by a convicted person, to the Attorney-General for India or to the Advocate-General or the Government Advocate of the State concerned, or to both as the case may require, and, in cases where the appeal is by the Government, to the accused, and shall also furnish the Attorney-General for India and/or the Advocate-General or the Government Advocate concerned or the accused, as the case may be, with a copy of the petition of appeal and other accompanying papers, if any.

9. The Registrar shall thereafter send a copy of the petition of appeal and the accompanying papers, if any, to the High Court concerned for its record. The High Court shall then arrange for the printing of the record in the case and for the transmission of the printed record to the Registrar with all convenient speed. In the preparation of the printed record, the High Court may include the printed paper book prepared for its own use at an earlier stage. The record shall be printed at the expense of the appellant, unless otherwise ordered by the Court, but in appeals involving sentence of death, the record shall be printed at the expense of the Government of the State concerned.

10. (i) As soon as the record has been got ready, the Registrar of the High Court shall despatch to the Registrar of this Court not less than fifteen copies. (ii) In all cases involving a sentence of death, where sufficient number of copies of the High Court printed record are available, they shall be despatched to this Court along with such additional records as may be necessary as soon as these are printed, and where the record is to be printed afresh for the Supreme Court appeal the printed record shall be made ready and despatched to this Court within a period of sixty days after the receipt of the intimation from the Registrar of the Court of the filing of the petition of appeal.

11. Where the accused person is not represented by counsel of his choice the Court may, in a proper case, direct the engagement of an Advocate at the cost of the Government. The fee of the Advocate so engaged shall be Rs. 100 per day of the hearing.

12. Due notice shall be given to the accused of the date fixed for the hearing of the appeal. The accused person may, where he so desires, present his case by submitting his argument in writing and the Court shall consider the same at the hearing of the appeal.

13. The Court may, where it thinks fit to do so in the interests of justice, direct the production of an accused person in custody at the hearing of the appeal to enable him to argue his case or for other reasons.

14. After the appeal has been disposed of the Registrar shall, with the utmost expedition, send a copy of the Court's judgment or order to the High Court concerned.

15. Pending the disposal of any appeal under these Rules, the Court may order that the execution of the sentence or order appealed against be stayed on such terms as the Court may think fit.

16. In criminal proceedings no security for costs shall be required to be deposited, and no court-fee, process fee, or search fee shall be charged, and no copying charges shall be levied except for copies other than the first.

17. Save as aforesaid, the preceding Orders in this Part of these rules shall, with the necessary modifications and adaptations, apply, so far as may be, to criminal appeals under this Order, but it shall not be necessary to file a statement of case in appeals under this Order.

PART III

Original Jurisdiction

ORDER XXII

PARTIES TO SUITS

1. Two or more plaintiffs may join in one suit in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist.

2. Two or more defendants may be joined in one suit against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist.

3. (1) The Court may at any such stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any plaintiff or defendant improperly joined be struck out, and that the name of any plaintiff or defendant who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.

(2) No person shall be added as a plaintiff without his consent.

4. Where it appears to the Court that any causes of action joined in one suit cannot conveniently be tried or disposed of together the Court may order separate trials or make such other order as may be expedient.

5. Where it appears to the Court that any joinder of plaintiffs or defendants may embarrass or delay the trial of the suit, the Court may order separate trials or make such order as may be expedient.

ORDER XXIII

PLAINTS

1. Every suit shall be instituted by the presentation of a plaint.

2. A plaint shall be presented to the Registrar, and all plaints shall be registered and numbered by him according to the order in which they are presented.

3. Every plaint shall comply with the rules contained in Order XXVI of these Rules so far as they are applicable.

4. A plaint shall contain the following particulars :—

(a) the names of the plaintiff and of the defendant;

(b) the facts constituting the cause of action and when it arose;

(c) the facts showing that the Court has jurisdiction;

(d) the declaration or relief which the plaintiff claims.

5. The plaintiff shall endorse on the plaint, or annex thereto, a list of the documents (if any) which he has produced along with it and the Registrar shall sign the list if on examination he finds it to be correct.

6. The plaint shall be rejected :—

(a) where it does not disclose a cause of action;

(b) where the suit appears from the statement in the plaint to be barred by any law.

7. Where a plaint is rejected the Court shall record an order to that effect with the reasons for the order.

8. The rejection of the plaint shall not of itself preclude the plaintiff from presenting a fresh plaint in respect of the same cause of action.

9. Where a plaintiff sues upon a document in his possession or power, he shall produce it to the Registrar when the plaint is presented and shall at the same time deliver the document or a copy thereof to be filed with the plaint.

10. Where the plaintiff relies on any other documents (whether in his possession or power or not) as evidence in support of his claim, he shall enter such documents in a list to be added or annexed to the plaint.

11. Where any such document is not in the possession or power of the plaintiff, he shall, if possible, state in whose possession or power it is.

12. A document which ought to be produced in Court by the plaintiff when the plaint is presented, or to be entered in the list to be added or annexed to the plaint, and which is not produced or entered accordingly, shall not, without the leave of the Court, be received in evidence at the hearing of the suit.

ORDER XXIV

Issue and Service of Summons

1. When a suit has been duly instituted a summons shall be issued to the defendant to appear and answer the claim.

2. Every summons shall be signed by the Registrar, and shall be sealed with the Seal of the Court.

3. Every summons shall be accompanied by a copy of the plaint.

4. The summons shall be served by being sent by registered post to the Attorney-General for India or the Advocate-General for the State, as the case may be, or to an Advocate on record of the defendant empowered to accept service.

5. There shall be endorsed on every summons a notice requiring the defendant to enter an appearance within twenty-eight days after the summons has been served.

6. A defendant shall enter the appearance by filing in the Registry a memorandum in writing containing the name and place of business of his Advocate on record, if any, and in default of appearance being entered within the time mentioned in the summons, or as hereinafter provided, the suit may be heard *ex parte*.

7. The defendant shall forthwith give notice of his having entered an appearance to the plaintiff.

8. The plaintiff shall within fourteen days after the defendant has entered an appearance take out a summons for directions returnable before the Judge in Chambers, and the Judge shall on the hearing of the summons give such directions with respect to pleadings, interrogatories, the admission of documents and facts, the discovery, inspection and production of documents and such other interlocutory matters as he may think expedient.

ORDER XXV

Written Statement, Set-off and Counter-claim

1. It shall not be sufficient for a defendant in his written statement to deny generally the facts alleged by the plaintiff but he shall deal specifically with each allegation of fact of which he does not admit the truth, except damages.

2. Where a defendant denies an allegation of fact he shall not do so evasively but shall answer the point of substance.

3. Each allegation of fact in the plaint, if not denied specifically or by necessary implication, or not expressly stated to be not admitted in the pleading of the defendant, shall be taken to be admitted, but the Court may in its discretion require any fact so admitted to be proved otherwise than by such admission.

4. Where the defendant claims to set-off against a demand by the plaintiff any ascertained sum of money, he may in his written statement, but not afterwards without the leave of the Court, state the grounds of his claim and the particulars of the debt sought to be set-off.

5. The written statement containing the particulars mentioned in the last preceding rule shall have the same effect as a plaint in a cross-suit so as to enable the Court to pronounce a final judgment in respect both of the original claim and of the set-off.

6. The rules relating to a written statement by a defendant shall apply to a witten statement by a plaintiff in answer to a claim of set-off.

7. No pleading subsequent to a written statement of a defendant other than by way of defence to a set-off shall be presented except by the leave of the Court and upon such terms as the Court may think fit, but the Court may at any time require a written statement or additional written statement from any of the parties and may fix a time for presenting the same.

8. Where any party from whom a written statement is so required fails to present the same within the time fixed by the Court, the Court may pronounce judgment against him, or make such orders in relation to the suit as it thinks fit.

9. The defendant, in addition to his right of pleading a set-off, may set up by way of counter-claim against the claims of the plaintiff any right or claim in respect of a cause of action accruing to him either before or after the filing of the suit but before he has delivered his defence and before the time limited for delivering his defence has expired, whether that counter-claim sounds in damages or not, and the counter-claim shall have the same effect as a cross-suit, so as to enable the Court to pronounce a final judgment in the same suit, both on the original claim and on the counter-claim.

10. The Court may if in its opinion the counter-claim cannot be disposed of in the pending suit or ought not to be allowed, refuse permission to the defendant to avail himself thereof, and require him to file a separate suit.

ORDER XXVI

Pleadings Generally

1. In this Order "pleading" means plaint or written statement.

2. Every pleading shall contain, and contain only, a statement in a concise form of the material facts on which the party pleading relies, but not the evidence by which those facts are to be proved, nor any argumentative matter, and shall be divided into paragraphs numbered consecutively.

3. Dates, sums and numbers shall be expressed in figures.

4. A further and better statement of the nature of the claim or defence, or further and better particulars of any matter stated in any pleading may in all cases be ordered, upon such terms, as to costs and otherwise, as may be just.

5. Wherever the contents of any document are material, it shall be sufficient to state the effect thereof as briefly as possible, without setting out the whole or any part thereof, unless the precise words of the document or any part thereof are material.

6. Every pleading shall be signed by, or by an Advocate on behalf of the Attorney-General for India or by, or by an Advocate on behalf of the Advocate-General for the State, as the case may be.

7. The Court may at any stage of the proceedings order to be struck out or amended any matter in any pleading which may be unnecessary or scandalous or which may tend to prejudice or embarrass or delay the trial of the suit, or which contravenes any of the provisions of this Order.

8. The Court may at any stage of the proceedings allow either party to amend his pleadings in such manner and on such terms as may be just, but only such amendments shall be made as may be necessary for the purpose of determining the real question in controversy between the parties.

9. If a party who has obtained an order for leave to amend does not amend accordingly within the time limited for that purpose by the order, or if no time is thereby limited then within fourteen days from the date of the order, he shall not be permitted to amend after the expiration of such limited time or of such fourteen days, as the case may be, unless the time is extended by the Court.

10. Amendments of pleadings made only for the purpose of rectifying a clerical error may be made on an order of the Registrar without notice, but unless otherwise ordered a copy of the order shall be served on all other parties.

ORDER XXVII

Discovery and Inspection

1. Order XI of the First Schedule to the Code shall apply with respect to discovery and inspection in suits instituted before the Court, except rules 5 and 23 of that Order.

NOTES.

This Rule makes the provisions of O. XI of the Code of Civil Procedure (except, however, Rules 5 and 23 thereof, which relate to Corporations and minor-plaintiffs and defendants respectively) applicable to discovery and inspection in suits instituted before the Supreme Court. The power of the Supreme Court in relation to applications for discovery and inspection may be exercised by the Registrar of the Supreme Court (*Vide*—O. 5, Rule 1 (1) *Supra*). The provisions of O. XI, Code of Civil Procedure (except Rules 5 and 23) as applicable to discovery and inspection in Supreme Court are as under :—

ORDER XI, C. P. C.

Discovery and Inspection

"1. In any suit the plaintiff or defendant by leave of the Court may deliver interrogatories in writing for the examination of the opposite parties or any one or more of such parties, and such interrogatories when delivered shall have a note at the foot thereof stating which of such interrogatories each of such persons is required to answer: Provided that no party shall deliver more than one set of interrogatories to the same party without an order for that purpose: Provided also that interrogatories which do not relate to any matters in question in the suit shall be deemed irrelevant, nothwithstanding that they might be admissible on the oral cross examination of a witness.

2. On an application for leave to deliver interrogatories, the particular interrogatories proposed to be delivered shall be submitted to the Court. In deciding upon such application, the Court shall take into account any offer, which may be made by the party sought to be interrogated to deliver particulars, or to make admissions, or to produce documents relating to the matters in question, or any of them, and leave shall be given as to such only of the interrogatories submitted as the Court shall consider necessary either for disposing fairly of the suit or for saving costs.

3. In adjusting the costs of the suit inquiry shall at the instance of any party be made into the propriety of exhibiting such interrogatories, and if it is the opinion of the taxing officer or of the Court, either with or without an application for inquiry, that such interrogatories have been exhibited unreasonably, vexatiously, or at improper length, the costs occasioned by the said interrogatories and the answers thereto shall be paid in any event by the party in fault.

4. Interrogatories shall be in Form No. 2 in Appendix C, with such variations as circumstances may require.

6. Any objection to answering any interrogatory on the ground that it is scandalous or irrelevant or not exhibited *bona fide* for the purpose of the suit, or that the matters inquiredi nto are not sufficiently material at that stage, or on any other ground, may be taken in the affidavit in answer.

7. Any interrogatories may be set aside on the ground that they have been exhibited unreasonably or vexatiously, or struck out on the ground that they are prolix, oppressive, unnecessary or scandalous; and any application for this purpose may be made within seven days after service of the interrogatories.

8. Interrogatories shall be answered by affidavit to be filed within ten days, or within such other time as the Court may allow.

9. An affidavit in answer to interrogatories shall be in Form No. 3 in Appendix C, with such variations as circumstances may require.

10. No exceptions shall be taken to any affidavit in answer, but the sufficiency or otherwise of any such affidavit objected to as insufficient shall be determined by the Court.

11. Where any person interrogated omits to answer, or answers insufficiently, the party interrogating may apply to the Court for an order requiring him to answer, or to answer further, as the case may be. And an order may be made requiring him to answer or answer further, either by affidavit or by *viva voce* examination, as the Court may direct.

12. Any party may, without filing any affidavit, apply to the Court for an order directing any other party to any suit to make discovery on oath of the documents which are or have been in his possession or power, relating to any matter in question therein. On the hearing of such application the Court may either refuse or adjourn the same, if satisfied that such discovery is not necessary, or not necessary at that stage of the suit, or make such order, either generally or limited to certain classes of documents, as may, in its discretion, be thought fit: Provided that discovery shall not be ordered when and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saving costs.

13. The affidavit to be made by a party against whom such order as is mentioned in the last preceding rule has been made, shall specify which (if any) of the documents therein mentioned he objects to produce, and it shall be in Form No. 5 in Appendix C, with such variations as circumstances may require.

14. It shall be lawful for the Court, at any time during the pendency of any suit, to order the production by any party thereto, upon oath, of such of the documents in his possession or power, relating to any matter in question in such suit, as the Court shall think right; and the Court may deal with such documents, when produced, in such manner as shall appear just.

15. Every party to a suit shall be entitled at any time to give notice to any other party, in whose pleadings or affidavits reference is made to any document, to produce such document for the inspection of the party giving such notice, or of his pleader, and to permit him or them to take copies thereof; and any party not complying with such notice shall not afterwards be at liberty to put any such document in evidence on his behalf in such suit unless he shall satisfy the Court that such document relates only to his own title, he being a defendant to the suit, or that he had some other cause or excuse which the Court shall deem sufficient for not complying with such notice, in which case the Court may allow the same to be put in evidence on such terms as to costs and otherwise as the Court shall think fit.

16. Notice to any party to produce any documents referred to in his pleading or affidavits shall be in Form No. 7 in Appendix C, with such variations as circumstances may require.

17. The party to whom such notice is given shall, within ten days from the receipt of such notice, deliver to the party giving the same a notice stating a time within three days from the delivery thereof at which the documents, or such of them as he does not object to produce, may be inspected at the office of his pleader, or in the case of bankers' books or other books of account or books in constant use for the purposes of any trade or business, at their usual place of custody, and stating which (if any) of the documents, he objects to produce and on what ground. Such notice shall be in Form No. 8 in Appendix C, with such variations as circumstances may require.

18. (1) Where the party served with notice under rule 15 omits to give such notice of a time for inspection or objects to give inspection, or offers inspection elsewhere than at the office of his pleader, the Court may, on the application of the party desiring it, make an order for inspection in such place and in such manner as it may think fit: Provided that the order shall not be made when and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saving costs.

(2) Any application to inspect documents, except such as are referred to in the pleadings, particulars or affidavits of the party against whom the application is made or disclosed in his affidavit of documents, shall be founded upon an affidavit showing of what documents inspection is sought, that the party applying is entitled to inspect them and that they are in the possession or power of the other party. The Court shall not make such order for inspection of such documents when and so for as the Court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saving costs.

19. (1) Where inspection of any business books is applied for, the Court may, if it thinks fit, instead of ordering inspection of the original books, order a copy of any entries therein to be furnished and verified by the affidavit of some person who has examined the copy with the original entries, and

such affidavit shall state whether or not there are in the original book any and what erasures interlineations or alterations : Provided that, notwithstanding that such copy has been supplied, the Court may order inspection of the book from which the copy was made.

(2) Where on an application for an order for inspection privilege is claimed for any document, it shall be lawful for the Court to inspect the document for the purpose of deciding as to the validity of the claim of privilege.

(3) The Court may, on the application of any party to a suit at any time, and whether an affidavit of documents shall or shall not have already been ordered or made, make an order requiring any other party to state by affidavit whether any one or more specific documents, to be specified in the application, is or are, or has or have at any time been, in his possession or power; and, if not then in his possession, when he parted with the same and what has become thereof. Such application shall be made on an affidavit stating that in the belief of the deponent the party against whom the application is made has, or has at some time had, in his possession or power the document or documents specified in the application and that they relate to the matters in question in the suit, or to some of them.

20. Where the party from whom discovery of any kind or inspection is sought objects to the same, or any part thereof, the Court may, if satisfied that the right to the discovery or inspection sought depends on the determination of any issue or question in dispute in the suit, or that for any other reason it is desirable that any issue or question in dispute in the suit should be determined before deciding upon the right to the discovery or inspection, order that such issue or question be determined first, and reserve the question as to the discovery or inspection.

21. Where any party fails to comply with any order to answer interrorgatories, or for discovery or inspection of documents, he shall, if a plaintiff, be liable to have his suit dismissed for want of prosecution, and if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had not defended, and the party interrogating or seeking discovery or inspection may apply to the Court for an order to that effect, and an order may be made accordingly.

22. Any party may, at the trial of a suit, use in evidence any one or more of the answers or any part of an answer of the opposite party to interrogatories without putting in the others or the whole of such answer : Provided always that in such case the Court may look at the whole of the answers, and if it shall be of opinion that any others of them are so connected with those put in that the last-mentioned answers ought not to be used without them, it may direct them to be put in."

2. Where the Court has made an order allowing one party to deliver interrogatories to the other, those interrogatories shall be answered by such persons as the Court may direct.

3. No application for leave to deliver interrogatories shall be made by the defendant until after he has filed his written statement.

4. After an order has been made for the delivery of interrogatories one set of the interrogatories, as allowed, shall be annexed and served with the order upon the person to be interrogated.

5. The Court may, for sufficient reason, allow any affidavit to be sworn, on behalf of the party from whom discovery, production or inspection is sought, by any person competent to make the same.

6. Where any document is ordered to be deposited in Court a copy of the order and a schedule of the document shall be left in the Registry at the time when the deposit is made.

7. When the purpose for which any documents have been deposited in Court is satisfied, the party by whom they were deposited may, pending the suit, have them delivered out to him, if he has the consent in wrinting of the other party, or an order of the Court.

ORDER XXVIII

Admissions

Order XII in the First Schedule to the Code with respect to admissions shall apply.

NOTES

This Order makes the Provisions of O. XII of the Code of Civil Procedure applicable with respect to admissions in all cases before the Supreme

Court in the exercise of its original jurisdiction. The said O. XII, Civil Procedure Code is reproduced below for facility of reference and runs as under :—

ORDER XII, C. P. C.

1. Any party to a suit may give notice, by his pleading, or otherwise in writinig, that he admits the truth of the whole or any part of the case of any other party.

2. Either party may call upon the other party to admit any document, saving all just exceptions; in case of refusal or neglect to admit, after such notice, the costs of proving any such document shall be paid by the party so neglecting or refusing, whatever the result of the suit may be, unless the Court otherwise directs; and no costs of proving any document shall be allowed unless such notice is given, except where the omission to give the notice is, in the opinion of the Court, a saving of expense.

3. A notice to admit documents shall be in Form No. 9 in Appendix C, with such variations as circumstances may require.

4. Any party may, by notice in writing, at any time not later than nine days before the day fixed for the hearing, call on any other party to admit, for the purposes of the suit only, any specific fact or facts mentioned in such notice. And in case of refusal or neglect to admit the same within six days after service of such notice, or within such further time as may be allowed by the Court, the costs of proving such fact or facts shall be paid by the party so neglecting or refusing, whatever the result of the suit may be, unless the Court otherwise directs : Provided that any admission made in pursuance of such notice is to be deemed to be made only for the purposes of the particular suit, and not as an admission to be used against the party on any other occasion or in favour of any person other than the party giving the notice: Provided also that the Court may at any time allow any party to amend or withdraw any admission so made on such terms as may be just.

5. A notice to admit facts shall be in Form No. 10 in Appendix C, and admissions of facts shall be in Form No. 11 in Appendix C, with such variations as circumstances may require.

6. Any party may, at any stage of a suit, where admissions of fact have been made, either on the pleadings, or otherwise apply to the Court for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties: and the Court may upon such application make such order, or give such judgment, as the Court may think just.

7. An affidavit of the pleader or his clerk, of the due signature of any admissions made in pursuance of any notice to admit documents or facts, shall be sufficient evidence of such admissions, if evidence thereof is required.

8. Notice to produce documents shall be in Form No. 12 in Appendix C, with such variations as circumstances may require. An affidavit of the pleader, or his clerk, of the service of any notice to produce, and of the time when it was served, with a copy of the notice to produce, shall in all cases be sufficient evidence of the service of the notice, and of the time when it was served.

9. If a notice to admit or produce specifies documents which are not necessary, the costs occasioned thereby shall be borne by the party giving such notice.

ORDER XXIX

Summoning and Attendance of Witnesses

1. The provisions of sections 28 and 32 of the Code shall apply to summons to give evidence or to produce documents under these Rules.

NOTES

"Provisions of Sections 28 and 32 of the Code." The Provisions of Sections 28 and 32 of the Code of Civil Procedure referred to in this Rule run as follows :

Summons and Discovery

28. *(1)* A summons may be sent for service in another State to such Court and in such manner as may be prescribed by rules in force in that State.

(2) The Court to which such summons is sent shall, upon receipt thereof, proceed as if it had been issued by such Court and shall then return the summons to the Court of issue together with the record (if any) of its proceedings with regard thereto.

32. The Court may compel the attendance of any person to whom a summons has been issued under section 30 and for that purpose may : —

(a) issue a warrant for his arrest ;
(b) attach and sell his property ;
(c) impose a fine upon him not exceeding five hundred rupees ;
(d) order him to furnish security for his appearance and in default commit him to the civil prison.

2. Order XVI in the First Schedule to the Code with respect to the summoning and attendance of witnesses shall apply, with the exception of the proviso to sub-rule (3) of rule 10, and the words "(a) within the local limits of the Court's ordinary original jurisdiction, or (b) without such limits but" in rule 19.

NOTES

Rule 2 of this Order makes the provisions of O. XVI, C. P. C. (with the exception of the proviso to Rule 10 (3) and the words "(a) within the local limits of the Court's ordinary original jurisdiction or (b) without such limits but in Rule 19 thereof) applicable to Supreme Court. Order XVI, C. P. C. as applicable to the Supreme Court is reproduced below:—

ORDER XVI C. P. C. AS MODIFIED BY THE ABOVE RULE

Summoning and Attendance of Witnesses

1. At any time after the suit is instituted, the parties may obtain, on application to the Court or to such officer as it appoints in this behalf, summonses to persons whose attendance is required either to give evidence or to produce documents.

2. *(1)* The party applying for a summons shall before the summons is granted and within a period to be fixed, pay into Court such a sum of money as appears to the Court to be sufficient to defray the travelling and other expenses of the person summoned in passing to and from the Court in which he is required to attend and for one day's attendance.

(2) In determining the amount payable under this rule, the Court may, in the case of any person summoned to give evidence as an expert, allow reasonable remuneration for the time occupied both in giving evidence and in performing any work of an expert character necessary for the case.

(3) Where the Court is subordinate to a High Court, regard shall be had, in fixing the scale of such expenses, to any rules made in that behalf.

3. The sum so paid into Court shall be tendered to the person summoned, at the time of serving the summons, if it can be served personally.

4. *(1)* Where it appears to the Court or to such officer as it appoints in this behalf that the sum paid into Court is not sufficient to cover such expenses or reasonable remuneration, the Court may direct such further sum to be paid to the person summoned as appears to be necessary on that account, and, in case of default in payment, may order such sum to be levied by attachment and sale of the moveable property of the party obtaining the summons; or the Court may discharge the person summoned, without requiring him to give evidence; or may both order such levy and discharge such person as aforesaid.

(2) Where it is necessary to detain the person summoned for a longer period than one day, the Court may, from time to time, order the party at whose instance he was summoned to pay into Court such sum as is sufficient to defray the expenses of his detention for such further period, and, in default of such deposit being made, may order such sum to be levied by attachment and sale of the moveable property of such party; or the Court may discharge the person summoned without requiring him to give evidence; or may both order such levy and discharge such person as aforesaid.

5. Every summons for the attendance of a person to give evidence or to produce a document shall specify the time and place at which he is required to attend, and also whether his attendance is required for the purpose of giving evidence or to produce a document, or for both purposes; and any particular document, which the person summoned is called on to produce, shall be described in the summons with reasonable accuracy.

6. Any person may be summoned to produce a document, without being summoned to give evidence; and any person summoned merely to produce a document shall be deemed to have complied with the summons if he causes such document to be produced instead of attending personally to produce the same.

7. Any person present in Court may be required by the Court to give evidence or to produce any document then and there in his possession or power.

8. Every summons under this Order shall be served as nearly as may be in the same manner as a summons to a defendant, and the rules in Order V as to proof of service shall apply in the case of all summonses served under this rule.

9. Service shall in all cases be made a sufficient time before the time specified in the summons for the attendance of the person summoned, to allow him a reasonable time for preparation and for travelling to the place at which his attendance is required.

10. *(1)* Where a person to whom a summons has been issued either to attend to give evidence or to produce a document fails to attend or to produce the document in compliance with such summons, the Court shall, if the certificate of the serving-officer has not been verified by affidavit, and may, if it has been so verified, examine the serving-officer on oath, or cause him to be so examined by another Court, touching the service or non-service of the summons.

(2) Where the Court sees reason to believe that such evidence or production is material, and that such person has, without lawful excuse, failed to attend or to produce the document in compliance with such summons or has intentionally avoided service, it may issue a proclamation requiring him to attend to give evidence or to produce the document at a time and place to be named therein; and a copy of such proclamation shall be affixed on the outer door or other conspicuous part of the house in which he ordinarily resides.

(3) In lieu of or at the time of issuing such proclamation, or at any time afterwards, the Court may, in its discretion, issue a warrant, either with or without bail, for the arrest of such person, and may make an order for the attachment of his property to such amount as it thinks fit, not exceeding the amount of the costs of attachment and of any fine which may be imposed under Rule 12.

11. Where, at any time after the attachment of his property, such person appears and satisfies the Court,—

(*a*) that he did not, without lawful excuse, fail to comply with the summons or intentionally avoid service, and,

(*b*) where he has failed to attend at the time and place named in a proclamation issued under the last preceding rule, that he had no notice of such proclamation in time to attend,

the Court shall direct that the property be released from attachment, and shall make such order as to the costs of the attachment as it thinks fit.

12. The Court may, where such person does not appear, or appears but fails so to satisfy the Court, impose upon him such fine not exceeding five hundred rupees as it thinks fit, having regard to his condition in life and all the circumstances of the case, and may order his property, or any part thereof, to be attached and sold or, if already attached under Rule 10, to be sold for the purpose of satisfying all costs of such attachment, together with the amount of the said fine, if any :

Provided that, if the person whose attendance is required pays into Court the costs and fine aforesaid, the Court shall order the property to be released from attachment.

13. The provisions with regard to the attachment and sale of property in the execution of a decree shall, so far as they are applicable, be deemed to apply to any attachment and sale under this Order as if the person whose property is so attached were a judgment-debtor.

14. Subject to the provisions of this Code as to attendance and appearance and to any law for the time being in force, where the Court at any time thinks it necessary to examine any person other than a party to the suit and not called as a witness by a party to the suit, the Court may, of its own motion, cause such person to be summoned as a witness to give evidence, or to produce any document in his possession, on a day to be appointed, and may examine him as a witness or require him to produce such document.

15. Subject as last aforesaid, whoever is summoned to appear and give evidence in a suit shall attend at the time and place named in the summons for that purpose, and whoever is summoned to produce a document shall either attend to produce it, or cause it to be produced, at such time and place.

16. *(1)* A person so summoned and attending shall, unless, the Court otherwise directs, attend at each hearing until the suit has been disposed of.

(2) On the application of either party and the payment through the Court of all necessary expenses (if any), the Court may require any person so summoned and attending to furnish security to attend at the next or any other hearing or until the suit is disposed of and, in default of his furnishing such security, may order him to be detained in the civil prison.

17. The provisions of Rules 10 to 13 shall, so far as the they are applicable, be deemed to apply to any person who having attended in compliance with a summons departs, without lawful excuse, in contravention of Rule 16.

18. Where any person arrested under a warrant is brought before the Court in custody and cannot, owing to the absence of the parties or any of them, give the evidence or produce the document which he has been summoned to give or produce, the Court may require him to give reasonable bail or other security for his appearance at such time and place as it thinks fit, and, on

such bail or security being given, may release him, and, in default of his giving such bail or security, may order him to be detained in the civil prison.

19. No one shall be ordered to attend in person to give evidence unless he resides—

at a place less than fifty or (where there is railway or steamer communication or other established public conveyance for five sixths of the distance between the place where he resides and the place where the Court is situate) less than two hundred miles distance from the Court-house.

20. Where any party to a suit present in Court refuses, without lawful excuse, when required by the Court, to give evidence or to produce any document then and there in his possession or power, the Court may pronounce judgment against him or make such order in relation to the suit as it thinks fit.

21. Where any party to a suit is required to give evidence or to produce a document, the provisions as to witnesses shall apply to him so far as they are applicable.

ORDER XXX

ADJOURNMENTS

Order XVII in the First Schedule to the Code with respect to adjournments shall apply, with the substitution in rule 2 of the words "in such manner as it thinks just" for the words "in one of the modes directed in that behalf by Order IX, or make such other order as it thinks fit."

NOTES

This Rule makes the provisions of Order XVII, C. P. C. as to adjournments applicable to the Supreme Court, except to the extent mentioned therein. Order XVII, C. P. C. as modified by this Rule is given below for facility of reference:—

ORDER XVII, C. P. C., AS APPLICABLE TO SUPREME COURT

Adjournments

1. *(1)* The Court may, if sufficient cause is shown, at any stage of the suit, grant time to the parties or to any of them, and may from time to time adjourn the hearing of the suit.

(2) In every such case the Court shall fix a day for the further hearing of the suit, and may make such order as it thinks fit with respect to the costs occasioned by the adjournment:

Provided that, when the hearing of evidence has once begun, the hearing of the suit shall be continued from day to day until all the witnesses in attendance have been examined, unless the Court finds the adjournment of the hearing beyond the following day to be necessary for reasons to be recorded.

2, Where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in such manner as it thinks just.

3. Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the Court may, notwithstanding such default, proceed to decide the suit forthwith.

ORDER XXXI

HEARING OF THE SUIT

1. Rules 1, 2, 3, 16, 17 and 18 of Order XVIII in the First Schedule to the Code with respect to the hearing of suits and examination of witnesses shall apply.

NOTES

Rules 1, 2, 3, 16, 17 and 18 of O. XVIII of the First Schedule to the Code—Rules 1, 2, 3, 16 to 18 of O. 18 of C. P. C., which have been made applicable with respect to the hearing of suits and examination of witnesses in the Supreme Court by this Rule are given below and run as follows:—

1. The plaintiff has the right to begin unless the defendant admits the facts alleged by the plaintiff and contends that either in point of law or on some additional facts alleged by the defendant the plaintiff is not entitled to any part of the relief which he seeks, in which case the defendant has the right to begin.

2. (1) On the day fixed for the hearing of the suit or on any other day to which the hearing is adjourned, the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove.

3. Where there are several issues, the burden of proving some of which lies on the other party, the party beginning may, at his option, either produce his evidence on those issues or reserve it by way of answer to the evidence produced by the other party; and, in the latter case, the party beginning may produce evidence on those issues after the other party has produced all his evidence, and the other party may then reply specially on the evidence so produced by the party beginning; but the party beginning will then be entitled to reply generally on the whole case.

16. *(1)* Where a witness is about to leave the jurisdiction of the Court, or other sufficient cause is shown to the satisfaction of the Court why his evidence should be taken immediately, the Court may, upon the application of any party or of the witness, at any time after the institution of the suit, take the evidence of such witness in manner herein before provided.

17. The Court may at any stage of a suit recall any witness who has been examined and may (subject to the law of evidence for the time being in force) put such questions to him as the Court thinks fit.

18. The Court may at any stage of a suit inspect any property or thing concerning which any question may arise.

2. Witnesses in attendance shall be examined orally in open Court and their evidence taken down in shorthand in the form of question and answer by such officers of the Court as may be appointed for the purpose.

3. The transcript of the shorthand note shall be signed by the officer recording the note and shall be deemed the deposition of the witness and shall form part of the record.

4. The party to any suit or matter in which the evidence has been taken in shorthand, and the witness whose evidence has been taken, shall be entitled upon payment of the prescribed fee to be furnished with a certified copy of the transcript.

ORDER XXXII

Withdrawal and Adjustment of Suits

1. Rules 1, 2 and 3 of Order XXIII in the First Schedule to the Code with respect to the withdrawal and adjustment of suits shall apply.

NOTES

This Rule makes the provisions of Rules 1 to 3 of Order XXIII. C. P. C. applicable with respect to the withdrawal and adjustment of suits in the Supreme Court. The said Rules 1 to 3 are reproduced below :

1. *(1)* At any time after the institution of a suit the plaintiff may, as against all or any of the defendants, withdraw his suit or abandon part of his claim.

(2) Where the Court is satisfied—

(a) that a suit must fail by reason of some formal defect, or

(b) that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim,

it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or abandon such part of a claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of a claim.

(3) Where the plaintiff withdraws from a suit, or abandons part of a claim, without the permission referred to in sub-rule (2), he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim.

(4) Nothing in this rule shall be deemed to authorise the Court to permit one of several plaintiffs to withdraw without the consent of the others.

2. In any fresh suit instituted on permission granted under the last preceding rule, the plaintiff shall be bound by the law of limitation in the same manner as if the first suit had not been instituted.

3. Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith so far as it relates to the suit.

2. No new suit shall be brought in respect of the same subject-matter until the terms or conditions, if any, imposed by the order permitting the withdrawal of a previous suit or giving leave to bring a new suit have been complied with.

ORDER XXXIII

PAYMENT INTO COURT

Order XXIV in the First Schedule to the Code with respect to payment into Court shall apply.

NOTES

Order XXIV, C. P. C. referred to above is given below:—

ORDER XXIV

Payment into Court

1. The defendant in any suit to recover a debt or damages may, at any stage of the suit, deposit in Court such sum of money as he considers a satisfaction in full of the claim.

2. Notice of the deposit shall be given through the Court by the defendant to the plaintiff, and the amount of the deposit shall (unless the Court otherwise directs) be paid to the plaintiff on his application.

3. No interest shall be allowed to the plaintiff on any sum deposited by the defendant from the date of the receipt of such notice, whether the sum deposited is in full of the claim or falls short thereof.

4. *(1)* Where the plaintiff accepts such amount as satisfaction in part only of his claim he may prosecute his suit for the balance; and, if the Court decides that the deposit by the defendant was a full satisfaction of the plaintiff's claim, the plaintiff shall pay the costs of the suit incurred after the deposit and the costs incurred previous thereto, so far as they were caused by excess in the plaintiff's claim.

(2) Where the plaintiff accepts such amount as satisfaction in full of his claim, he shall present to the Court a statement to that effect, and such statement shall be filed and the Court shall pronounce judgment accordingly; and, in directing by whom the costs of each party are to be paid, the Court shall consider which of the parties is most to blame for the litigation.

Illustrations

(a) *A* owes *B* Rs. 100. *B* sues *A* for the amount, having made no demand for payment and having no reason to believe that the delay caused by making a demand would place him at a disadvantage. On the plaint being filed, *A* pays the money into Court, *B* accepts it in full satisfaction of his claim, but the Court should not allow him any costs, the litigation being presumably groundless on his part.

(b) *B* sues *A* under the circumstances mentioned in illustration *(a)*. On the plaint being filed, *A* disputes the claim. Afterwards *A* pays the money into Court. *B* accepts it in full satisfaction of his claim. The Court should also give *B* his costs of suit. *A's* conduct having shown that the litigation was necessary.

(c) *A* owes *B* Rs. 100, and is willing to pay him that sum without suit. *B* claims Rs. 150 and sues *A* for that amount. On the plaint being filed *A* pays Rs. 100 into Court and disputes only his liability to pay the remaining Rs. 50. *B* accepts the Rs. 100 in full satisfaction of his claim. The Court should order him to pay *A's* costs.

ORDER XXXIV

SPECIAL CASE

Rules 1, 3 and 5 of Order XXXVI in the First Schedule to the Code with respect to procedure by way of Special Case shall apply, except the words "which would have jurisdiction to entertain a suit, the amount or value of the subject-matter of which is the same as the amount or value of the subject-matter of the agreement" in sub-rule (1) of rule 3, the words "claiming to be interested as plaintiff or plaintiffs" to the end of sub-rule (2) of rule 3; and the words "and upon the judgment so pronounced a decree shall follow" in sub-rule (2) of rule 5.

NOTES

Rules 1, 3 and 5 of Order XXXVI in the First Schedule to the code: — This Order makes the provisions of Order XXXVI, Rr. 1, 3 & 5 applicable with respect to procedure by way of Special Case, with the modifications enunciated above. The said rules (1, 3 & 5 of Order XXXVI, C. P. C.) as modified by this Order run as follows:—

1. *(1)* Parties claiming to be interested in the decision of any question of fact or law may enter into an agreement in writing stating such question in the form of a case for the opinion of the Court, and providing that upon the finding of the Court with respect to such question —

(a) a sum of money fixed by the parties or to be determined by the Court shall be paid by one of the parties to the other of them; or

(b) some property, moveable or immoveable, specified in the agreement, shall be delivered by one of the parties to the other of them; or

(c) one or more of the parties shall do, or refrain from doing, some other particular act specified in the agreement.

(2) Every case stated under this rule shall be divided into consecutively numbered paragraphs, and shall concisely state such facts and specify such documents as may be necessary to enable the Court to decide the question raised thereby.

3. *(1)* The agreement, if framed in accordance with the rules hereinbefore contained, may be filed in the Court.

(2) The agreement, when so filed, shall be numbered and registered as a suit between one or more of the parties, and the other or the others of them as defendant or defendants; and notice shall be given to all the parties to the agreement, other than the party or parties by whom it was presented.

5. *Hearing and disposal of case. (1)* The case shall be set down for hearing as a suit instituted in the ordinary manner, and the provisions of this Code shall apply to such suits so far as the same are applicable.

(2) Where the Court is satisfied, after examination of the parties, or after taking such evidence as it thinks fit,

(a) that the agreement was duly executed by them,

(b) that they have a *bona fide* interest in the question stated therein, and

(c) that the same is fit to be decided,

it shall proceed to pronounce judgment thereon, in the same way as in an ordinary suit.

PART IV

ORDER XXXV

Applications for Enforcement of Fundamental Rights

(Article 32 of the Constitution)

Habeas Corpus

1. An application for a writ of *habeas corpus* shall be filed in the Registry and shall be accompanied by an affidavit by the person restrained, stating that the application is made at his instance and setting out the nature and circumstances of the restraint. The application shall also state whether the applicant has moved the High Court concerned for the same relief and, if so, with what result:

Provided that where the person restrained is unable owing to the restraint to make the affidavit, the application shall be accompanied by an affidavit to the like effect made by some other person, which shall state the reason why the person restrained is unable to make the affidavit himself.

2. The application shall be heard by a Division Court, except in vacation, when it may be heard by a Single Judge.

3. If the Court is of opinion that a *prima facie* case for granting the application is made out, a rule *nisi* shall be issued calling upon the person or persons against whom the order is sought, to appear on a day to be named therein to show cause why such order should not be made and at the same time to produce in Court the body of the person or persons alleged to be illegally or improperly detained then and there to be dealt with according to law.

4. On the return day of such rule or on any day to which the hearing thereof may be adjourned, if no cause is shown or if cause is shown and disallowed, the Court shall pass an order that the person or persons improperly detained shall be set at liberty. If cause is allowed, the rule shall be discharged. The order for release made by the Court, or the Judge, shall be a sufficient warrant to any gaoler, public official, or other person for the release of the person under restraint.

5. In disposing of any such rule, the Court may in its discretion make such order for costs as it may consider just.

Mandamus, Prohibition, Certiorari, Quo-warranto, etc.

6. An application for a direction or order or writ in the nature of *mandamus, prohibition, certiorari* or *quo-warranto* shall be filed in the Registry. It shall set out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and shall be accompanied by an affidavit verifying the facts relied on, and at least six copies of the said application and affidavit shall be lodged in the Registry of the Court. It shall also state whether the applicant has moved the High Court concerned for the same relief and, if so, with what result. The application shall be made by notice of motion, but the Registrar may in appropriate cases put up the application before the Court for orders as to the issue of notice.

7. Such application shall be heard by a Division Court, except in vacation, when it may be heard by a Single Judge. Unless the Court otherwise directs, there shall be at least eight clear days between the service of the notice of motion and the day named therein for the hearing of the motion.

8. Copies of the said application and the affidavit in support thereof shall be served with the notice of motion and every party to the proceeding shall supply to any other party, on demand and on payment of the proper charges, copies of any affidavit filed by him.

9. The notice shall be served on all persons directly affected, and on such other persons as the Court may direct :

Provided that on the hearing of any such motion, any person who desires to be heard in opposition to the motion and appears to the Court to be a proper person to be heard shall he heard, notwithstanding that he has not been served with the notice of motion and shall be liable to costs in the discretion of the Court if the order shall be made.

10. The Court may in such proceedings impose such terms as to costs and as to the giving of security as it thinks fit.

11. The provisions of Order XVII relating to petitions shall, so far as may be applicable, apply to petitions under this order.

PART V

ORDER XXXVI

SPECIAL REFERENCE UNDER ARTICLE 143 OF THE CONSTITUTION

1. On the receipt by the Registrar of the order of the President referring a question of law or fact to the Court, the Registrar shall give notice to the Attorney-General for India to appear before the Court on a day specified in the notice to take the directions of the Court as to the parties who shall be served with notice of the Special Reference, and the Court may, if it considers it desirable, order that notice of the Special Reference, shall be served upon such parties as may be named in the order.

2. The notice shall require all such parties served therewith as desire to be heard at the hearing of the Special Reference to attend before the Registrar on the day fixed by the order to take the directions of the Court with respect to statements of facts and arguments and with respect to the date of the hearing.

3. Subject to the provisions of this Order, the procedure on a Special Reference shall follow as nearly as may be the procedure in proceedings before the Court in the exercise of its original jurisdiction, but with such variations as may appear to the Court to be appropriate and as the Court may direct.

4. After the hearing of the Special Reference, the Registrar shall transmit to the President the Report of the Court thereon.

5. The Court may make such order as it thinks fit as to the costs of all parties served with notice under these Rules and appearing at the hearing of the Special Reference.

PART VI

ORDER XXXVII

REFERENCES UNDER ARTICLE 317 (1) OF THE CONSTITUTION

1. On receipt by the Registrar of the order of the President referring to the Court a case for inquiry under Article 317 (1) of the Constitution, the Registrar shall give notice to the Chairman or member of the Public Service Commission concerned and to the Attorney-General for India or the Advocate-General of the particular State to appear before the Court on a day specified in the notice to take the directions of the Court in the matter of the inquiry. A copy of the charges preferred against him shall be furnished to the respondent along with the notice.

2. The Court may summon such witnesses as it considers necessary.

3. After the hearing of the Reference, the Registrar shall transmit to the President the Report of the Court.

4. No court-fees or process fees shall be payable in connection with any reference dealt with by the Court under this Order.

PART VI-A

ORDER XXXVII-A

Election Petitions under Part III of the Presidential and Vice-Presidential Elections Act, 1952 (Act No. XXXI of 1952)

1. In this Order, unless the context or subject-matter otherwise requires :—

(a) "the Act" means the Presidential and Vice-Presidential Elections Act, 1952 ;

(b) the words defined in sections 2 and 13 of the Act shall have the respective meaning assigned to them by those sections.

2. An application calling in question an election shall only be by a petition made and presented in accordance with the provisions of this Order.

3. The petition shall be made on a court-fee stamp of the value of rupees 250 and shall be signed by the petitioner, or all the petitioners, if there are more than one, or by a duly authorised Advocate on record of the Court, on his or their behalf.

4. The petition shall be divided into paragraphs numbered consecutively, each paragraph being confined to a distinct portion of the subject, and shall be printed or typed legibly on one side of standard petition-paper, demy-foolscap size, or on paper of equally superior quality.

5. The petition shall state the right of the petitioner under the Act to petition the Court and briefly set forth the facts and grounds relied on by him to sustain the relief or reliefs claimed by him.

6. The allegations of fact contained in the petition shall be verified by an affidavit to be made personally by the petitioner or by one of the petitioners, if more than one :

Provided that where the petitioner is unable to make such affidavit by reason of absence, illness or other sufficient cause it may with the sanction of the Judge in Chambers to be given at the time of the presentation, of the petition, be made by any person duly authorised by the petitioner and competent to make the same.

7. A petition calling in question an election may be presented on one or more of the grounds specified in sub-section (1) of section 18 and section 19 of the Act, by any candidate at such election, or by ten or more electors who may join together as petitioners.

8. Where the petitioner claims a declaration under clause (a) of section 16 of the Act, he shall implead the returned candidate as the respondent, and where he claims a declaration under clause (b) of the said section, he shall implead as respondents all candidates other than himself, duly nominated at the election.

9. The petition may be presented at any time after the date of publication of the declaration containing the name of the returned candidate at the election under section 12 of the Act, but not later than thirty days from the date of such publication.

10. The presentation of the petition shall be made by delivering it to the Registrar of the Court in his Chambers in the Court House, unless it is presented before the Judge in Chambers under rule 6.

11. The petitioner shall also lodge, along with the petition, at least twelve copies of the petition and of all documents which accompany it.

12. Upon the presentation of the petition, the petitioner, shall deposit a sum of Rs. 2,000 in cash with the Registrar or Deputy Registrar of the Court as security for the payment of all costs that may become payable by the petitioner.

13. Upon the presentation of the petition, the Judge in Chambers, or the Registrar, before whom it is presented, may give such directions for service of the petition and advertisement thereof as he thinks proper and also appoint a time for the hearing of the petition.

14. Unless otherwise ordered, the notice of the presentation of the petition, accompanied by a copy of the petition, shall within five days of the presentation thereof or within such further time as the Court may allow, be served by the petitioner or his Advocate on record on the respondent or respondents, the Secretary to the Election Commission, the Returning Officer and the Attorney-General for India. Such service shall be effected personally or by registered post, as the Court or Registrar may direct. Immediately after such service the petitioner or his Advocate on record shall file with the Registrar an affidavit of the time and manner of such service.

15. Unless dispensed with by the Judge in Chambers or the Registrar, as the case may be, notice of the presentation of the petition shall be published in the Gazette of India and also advertised in newspapers at the expense of the petitioner or petitioners, fourteen clear days before the date appointed for the hearing thereof in such manner as the Court or the Registrar may direct.

16. Every elector shall on payment of the usual fees, be entitled, within twenty-four hours after such payment, to be furnished by the petitioner or his Advocate on record with a copy of the petition and of the affidavit in verification thereof and shall also be entitled upon payment of the prescribed fees to obtain copies from the Court.

17. A person on whom the notice of the presentation of the petition has been served or any other candidate or an elector who intends to appear on the hearing of the petition shall leave with, or send by registered post to, the petitioner or his Advocate on record, notice of such intention signed by him or his Advocate on record, if any. Such notice shall be served or, if sent by registered post, shall be posted in time to reach the addressee not later than two clear days before the day appointed for the hearing of the petition. No person who has failed to comply with this rule shall be allowed to appear on the hearing of the petition without the leave of the Court.

18. An affidavit intended to be used by a person other than the petitioner either in support of the petition or in opposition to the same shall be filed not less than five days before the date fixed for the hearing thereof and notice of the filing thereof shall be given to the petitioner or his Advocate on record on the day on which the affidavit is filed. If any person fails to comply with this rule the affidavit, unless the Court otherwise directs, shall not be used at the hearing of petition.

19. An affidavit intended to be used in reply to an affidavit filed in opposition to, or in support of, the petition shall be filed not less than two days before the date fixed for the hearing of the petition. Notice of such filing shall be given forthwith to the person by whom the affidavit in opposition to, or in support of, the petition, as the case may be, was filed or to his Advocate on record.

20. Every petition calling in question an election shall be posted before and be heard and disposed of by a Bench of the Court consisting of not less than five Judges.

21. The petition shall not be withdrawn, save with the leave of the Court to be obtained upon application made for the purpose by notice of motion.

22. Where there are more petitioners than one, no application to withdraw a petition shall be made except with the consent of all the petitioners given in writing.

23. An application for leave to withdraw a petition which has been advertised in accordance with the provisions of R. 15 hereof shall not be heard at any time before the date fixed in the advertisement for the hearing of the petition.

24. No application for withdrawal shall be granted if in the opinion of the Court such application has been induced by any extraneous or improper bargain or consideration.

25. When a petitioner/petitioners applies/apply for leave to withdraw his/their petition or asks/ask that it be dismissed or that the hearing thereof be adjourned without mentioning sufficient cause or fails/fail to appear in support thereof or if appearing does/do not apply for an order in terms thereof or if for any other sufficient reason the Court thinks so to do, the Court may, upon such terms as it thinks just, make an order permitting the petitioner/petitioners to withdraw or dismissing the petitioner/petitioners from the petition for default and may, upon such terms as it thinks just, substitute as petitioner/petitioners any other candidate or any other ten electors who in its opinion would have a right to present a petition and is/are desirous of prosecuting the petition already admitted.

26. If no order for substitution of a new petitioner or petitioners be made by the Court under the last preceding rule but the Court only permits the withdrawal of the petition, or dismisses the petitioner/petitioners from the petition, notice of the order of withdrawal of the petition or dismissal of the petitioner/petitioners shall be published by the Registrar in the Gazette of India and in the newspaper in which the original petition had been advertised under rule 15 and the Court may, on the application made within fourteen days of the publication of such notice in the Gazette of India by any other candidate or another ten electors who might himself or themselves have been a petitioner or petitioners, make an order upon such terms as it thinks fit, substituting such petitioner or petitioners in place of the petitioner or petitioners withdrawing or not appearing at the hearing or not proceeding with the petition. If no such application is

made within the time aforesaid or, if made, the Court does not think fit to grant the same, the original petition shall stand dismissed.

27. Where the Court allows a candidate or ten electors to be substituted as petitioner or petitioners under rule 25 or rule 26, the Court shall appoint a date for the hearing of the petition and such substituted petitioner or petitioners shall within seven days from the making of the order file a clean copy of the petition with such consequential amendments as may be necessary by reason of the order of substitution therein and shall also file an affidavit verifying such amendments. The amended petition shall be treated as the petition for calling in question the election.

28. Upon hearing the application for withdrawal or at the time of making an order for substitution, the Court may, if it thinks fit, by order direct that the amount deposited by the original petitioner as security for the costs of the respondent or respondents be applied in payment of the costs incurred by him or them upto the date of the substitution of the new petitioner or petitioners, so far as it may be necessary and the balance, if any, shall be refunded to the original petitioner or petitioners within seven days from the date of the order of substitution or such further time as the Court may allow.

29. Unless otherwise ordered by the Court, the substituted petitioner or petitioners shall deposit with the Registrar a sum of Rs. 2,000 as and by way of security for the costs of the respondent or respondents.

30. An election petition shall abate by the death of a sole petitioner or in case of several petitioners on the death of the survivor of them :

Provided that there shall be no abatement after the hearing of the petition has been concluded.

31. The abatement of a petition shall not affect the liability of the amount deposited by the petitioner as security for costs or the estate of the petitioner or petitioners for the payment of costs previously incurred.

32. On the abatement of a petition under rule 30, notice of such abatement having taken place shall be published by the Registrar in the Gazette of India and the newspapers in which the original petition had been advertised and the Court may on the application made within fourteen days of the publication of such notice in the Gazette of India by any other candidate or another ten electors who might himself or themselves have been a petitioner or petitioners make an order, upon such terms as it thinks fit, substituting him or them in the place of the original petitioner or petitioners and the procedure prescribed in rule 27 and the provisions of rule 29 shall apply in relation to the substituted petitioner or petitioners.

33. If before the conclusion of the hearing of an election petition any contesting respondent dies or gives notice that he does not intend to oppose the petition and there is no other respondent who is opposing the petition, the Registrar shall cause a notice of such facts to be published in the Gazette of India and the newspapers in which the original petition had been advertised and any candidate or ten electors who might have been a petitioner or petitioners may, within fourteen days after such publication, apply to be substituted in the place of the respondent dying or not proceeding with his opposition to oppose the petition and the Court may make such order upon such terms as it thinks fit.

34. Subject to the provisions of this Order and any special order or directions of the Court, the procedure on an election petition shall follow, as nearly as may be, the procedure in proceedings before the Court in the exercise of its original jurisdiction.

35. At the conclusion of the hearing of the election petition, the Court shall make an order at once or on some future day of which due notice shall be given by the Registrar to all persons who appeared at the hearing of the petition.

36. After the order of the Court has been announced, the Registrar shall send a copy thereof to the Central Government for publication in the Official Gazette.

PART VII

ORDER XXXVIII

Review

1. The Court may review its judgment or order, but no application for review will be entertained except on the grounds mentioned in Order XLVII, rule 1, of the Code.

Scope of this rule:—This rule permits the Supreme Court to review its own judgment or order *suo motu* but if a party seeks review of such judgment or order, no application for review will be entertained except on the grounds mentioned in O. 47, r. 1, C. P. C. The grounds for review are mentioned in sub-rule (1) of rule 1 of O. 47, which runs as follows;—

1 *(1)* Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,

(b) by a decree or order from which no appeal is allowed, or

(c) by a decision on a reference from a Court of Small Causes,

and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the Appellate Court the case on which he applies for the review.

2. An application for review shall be filed with the Registrar, within thirty days after judgment is delivered in the appeal, cause or matter. It must briefly and distinctly state the grounds for review, and be accompanied by a certificate of counsel that it is supported by proper grounds.

PART VIII

ORDER XXXIX

Costs

1. Subject to the provisions of any Statute or of these Rules, the costs of and incidental to all proceedings shall be in the discretion of the Court. Unless the Court otherwise orders an intervener shall not be entitled to costs.

2. Where it appears that the hearing of any suit or matter cannot conveniently proceed by reason of the neglect of the Advocate on record of any party to attend personally, or by some proper person on his behalf, or of his omission to deliver any paper necessary for the use of the Court which ought to have been delivered, the Advocate on record shall personally pay to all or any of the parties such costs as the Court may think fit to award.

ORDER XL

Taxation

1. The Registrar, or such other officer as the Chief Justice may appoint for the purpose, shall be the Taxing Officer of the Court.

2. The Taxing Officer shall allow all such costs, charges and expenses as appear to him to have been necessary or proper for the attainment of justice or for defending

the rights of any party, and shall not allow any costs, charges and expenses which appear to him to have been incurred or increased unnecessarily or through negligence or mistake.

3. The Court may, in any proceedings where costs are awarded to any party, direct payment of a sum in gross in lieu of taxed costs, and may direct by and to whom that sum shall be paid.

4. Where in the opinion of the Taxing Officer a fee ought to be allowed for any matter not provided for in these Rules or a question arises in taxation on which he considers it necessary to obtain the directions of the Chamber Judge the Taxing Officer may refer such matter to the Chamber Judge for orders.

5. Where the Taxing Officer is of opinion that any costs have been injuriously or unnecessarily occasioned by the negligence or improper conduct of any Advocate on record, he shall not allow any charge for the same without the leave of the Court.

6. The Taxing Officer shall without delay bring to the notice of the Chamber Judge any wrong charge which appears to him to have been wilfully made in any bill of costs.

7. Every bill of costs lodged for taxation shall specify the exact number of folios contained in the bill lodged.

8. Every bill of costs shall be properly dated throughout and shall show in a column for the purpose the money paid out of pocket.

9. Every bill of costs shall be certified by the signature of the Advocate on record in the case.

10. The fees for taxation and registration of every bill of costs shall be paid in court-fee stamps when the bill is lodged for taxation.

11. Every bill of costs shall, wherever possible, be accompanied by vouchers, and every item of disbursement and the cause thereof shall be distinctly specified, and no payment out of pocket shall be allowed except on production of the necessary voucher, or in the case of Advocate's fees, without the signature of the Advocate that the fee has been paid :

Provided that in the case of the Attorney-General or the Solicitor-General, or the Advocate-General of any State, or other Government Advocate, appearing for the Government, and in any case where the Chamber Judge so directs, the fee may be allowed without the production of a certificate that the fee has been paid.

12. Within three weeks from the date of the judgment or order awarding costs, or within such further time not exceeding two weeks as the Taxing Officer may for good cause allow, the party to whom the costs have been awarded shall lodge in the Registry the bill of costs and vouchers. He shall also serve on the opposite party a copy of the bill of costs and file in the Registry proof of such service. The Taxing Officer shall fix a date for the taxation of the bill and shall notify the parties of the date fixed.

13. A bill of costs presented out of time shall be returned to the party and the Taxing Officer shall not receive or tax the same except by order of the Chamber Judge.

14. Except as otherwise provided in these rules or by any law for the time being in force, the fees set out in the Second and Fourth Schedules to these rules may be allowed to Adocates and officers of Court respectively.

15. No retaining fee to an Advocate shall be allowed on taxation as between party and party.

16. Where an Advocate appears for different parties in the same suit, appeal or matter, only one set of fees shall be allowed, unless the Court otherwise orders.

17. Where two or more appeals arising out of a single proceeding are heard together and costs are awarded in both or all of them, only one set of counsel's fee

shall be allowed for the hearing, unless the Court or the Chamber Judge otherwise directs.

18. In defended appeals, suits and references under Articles 143 and 317 *(1)* of the Constitution, the first day's hearing fee shall be allowed in full as per the Schedule, for the first four and a half hours of the hearing or part thereof, subject to the provisions contained in rules 20 and 21 hereunder.

19. No refresher shall be allowed unless the hearing has lasted for more than four and a half hours, and the Taxing Officer shall have discretion to reduce the refresher or to allow an additional refresher having regard to the duration of the hearing after the first four and a half hours. The Refresher shall, however, not be reduced by more than one-half.

20. Where the hearing of a part-heard case is held up on account of the Court being occupied with any miscellaneous matters, the time taken in the hearing of such miscellaneous matters shall be taken into consideration by the Taxing Officer for purposes of a refresher.

21. In cases involving less than Rs. 20,000 in value, the Taxing Officer shall have discretion to reduce the fees, including the first day's hearing fee and the 'acting' fee, suitably according to the nature of the case.

22. Where an appeal is compromised prior to its being set down for hearing, the fees to be allowed to counsel under item 1 of Part I of Schedule II shall be half the amounts specified therein subject to the terms of the compromise.

23. The fees provided in items 3 to 8 of Part I of the Second Schedule shall be subject to reduction in the discretion of the Taxing Officer according to the nature of the case.

24. Where a dispute arises between the advocate on record and his client as to the fees and charges payable to the Advocate, either party may apply to the Chamber Judge for an order to have the bill taxed and, on an order for taxation being made, the Taxing Officer may proceed to tax the bill. The application, when made by the Advocate, shall be accompanied by a copy of the bill sought to be taxed:

Provided that where the client has expressed his consent in writing to the taxation of costs between himself and his Advocate on record in any proceeding, the Advocate may present his bill of costs in that proceeding for taxation without an order of the Chamber Judge, and the Taxing Officer shall thereupon proceed to tax the bill.

25. In every case of taxation between advocate and client the client shall be duly summoned by the Taxing Officer to attend the taxation, and the summons shall be served on the client at least two weeks prior to the date fixed for taxation.

26. Subject to any agreement in writing to the contrary, the rules regulating the taxation of costs between party and party shall be applicable as far as may be to taxation between Advocate and client.

27. No agreement between the Advocate on record and his client to pay fees higher than those prescribed in the Second Schedule shall be recognized unless the same has been recorded in writing and is signed by the client and has been filed before the commencement of the hearing or within such further time as the Chamber Judge may allow.

28. Where the Taxing Officer is of the opinion that any such agreement filed as aforesaid is unfair or unreasonable, he may require the opinion of the Chamber Judge to be taken thereon and the Judge may make such order as he may think just, and the taxation shall proceed in accordance with such order:

Provided that where the fees are payable by the client personally or out of a fund belonging entirely to him, any fees actually paid by the Advocate on record to the Senior or other Advocate in excess of the fees prescribed in the Schedule with the previous written consent of the client, shall not be called in question, if such consent has been filed prior to the commencement of the hearing or within such further time as the Chamber Judge may allow.

29. Where the amount of a bill of costs between Advocate and client is reduced by 1/6th or more, the Advocate's fee for attending taxation shall be disallowed.

30. An advocate whose bill against his client has been taxed may apply to the Chamber Judge for an order against his client or his legal representative for payment of the sum allowed on taxation or such sum thereof as may remain due to him. The order so made may be transmitted for execution to such Court as the Chamber Judge may direct.

31. Any party who is dissatisfied with the allowance or disallowance by the Taxing Officer of the whole or any part of the items in a bill of costs may apply to the Taxing Officer to review the taxation in respect thereof.

32. An application for review shall be made within a week from the date of the passing of the bill in the Taxing Office, and four days' notice thereof shall be given to the other party.

33. Objections in writing specifying concisely the items or parts of the bill objected to and the grounds for the objections shall be served with the notice on the other party, and a copy thereof shall at the same time be carried in before the Taxing Officer.

34. Objections which were not taken in at the time of the taxation shall not be taken in at the stage of review, unless allowed by the Taxing Officer.

35. Upon application to review his order, the Taxing Officer shall reconsider his taxation upon the objections carried in and may, where he thinks fit, receive further evidence in respect thereof, and shall state in a certificate the grounds of his decision thereon and any special facts or circumstances relating thereto.

36. Any party dissatisfied with the decision of the Taxing Officer on review may, not later than seven days from the date of the decision, or within such further time as the Taxing Officer or the Chamber Judge may allow, apply to the Chamber Judge for an order to review the decision of the Taxing Officer and the Chamber Judge may thereupon make such order as may seem just.

37. No evidence shall be received by the Chamber Judge upon the review of the Taxing Officer's decision which was not before the Taxing Officer when he taxed the bill or reviewed his taxation unless the Chamber Judge otherwise directs.

38. The certificate of the Taxing Officer by whom any bill has been taxed shall unless it is set aside or altered by the Chamber Judge, be final as to the amount of the costs covered thereby.

39. The allowances to be made to witnesses per diem shall be such as the Taxing Officer may think reasonable having regard to the profession or status of the witness.

40. Witnesses residing more than five miles from the place where the Court sits shall be allowed travelling expenses according to the sums reasonably and actually paid by them and shall also be allowed such sum for subsistence money and carriage hire as the Taxing Officer, having regard to the daily allowances allowed under rule 39, considers reasonable.

41. Every person summoned to give evidence shall have tendered to him with the summons a reasonable sum for his travelling expenses (if any) and for the first day's attendance and shall, if obliged to attend for more than one day, be entitled,

before giving his evidence, to claim from the party by whom he has been summoned the appropriate allowances and expenses for each additional day that he may be required to attend.

42. Witnesses who have not been paid such reasonable sums for their expenses as the Court allows by its Rules may apply to the Court at any time in person to enforce the payment of such sum as may be awarded to them.

43. For the purposes of this Order, a folio shall consist of two hundred words; seven figures shall be counted as one word; and more than half part of a folio shall be reckoned as a folio.

PART IX

Miscellaneous

ORDER XLI

Notice of Proceedings to the Attorney-General for India or Advocates-General of States

1. The Court may direct notice of any proceedings to be given to the Attorney-General for India or to the Advocate-General of any State, and the Attorney-General for India or the Advocate-General to whom such notice is given may appear and take such part in the proceedings as he may be advised.

2. The Attorney-General for India or the Advocate-General of any State may apply to be heard in any proceedings before the Court, and the Court may, if in its opinion the justice of the case so requires, permit the Attorney-General for India or the Advocate-General so applying to appear and be heard, subject to such terms as to costs or otherwise as the Court may think fit.

ORDER XLII

Forms to be used

1. Every writ, summons, order, warrant or other mandatory process shall run and be in the name of the President of India and shall bear the attestation of the Chief Justice, and shall be signed by the Registrar with the day and the year of signing, and shall be sealed with the Seal of the Court.

2. The forms set out in the Fifth Schedule to these Rules, or forms substantially to the like effect with such variations as the circumstances of each case may require, shall be used in all cases where those forms are appropriate.

ORDER XLIII

Service of Documents

1. Except where otherwise provided by any Statute or prescribed by these Rules, all notices, orders or other documents required to be given to, or served on, any person shall be served in the manner provided by the Code for the service of a summons.

2. Service of any notice, order or other document on the Advocate on record of any party may be effected by delivering it to the Advocate on record or by leaving it with a clerk in his employ at his place of business.

3. Service of any notice, order or other document upon a person who resides at a place within the territory of India between which place and Delhi there is communication by registered post, may be effected by posting a copy of the document required to be served in a prepaid envelope registered for acknowledgment, addressed to the party or person at the place where he ordinarily resides:

Provided that the Registrar may direct in a particular case or class of cases, that the service shall be effected in the manner provided by the Code for the service of summons.

4. A document served by post shall be deemed to be served at the time at which it would be delivered in the ordinary course of post.

5. Except where the notice or process has been served through the Registry, the party required to effect the service shall file an affidavit of service, along with such proof thereof as may be available, stating the manner in which the service has been effected.

6. Where the notice, order or other document has been served through another Court, the service may be proved by the deposition of affidavit of the serving officer made before the Court through which the service was effected.

7. Service effected after Court hours shall for the purpose of computing any period of time subsequent to that service be deemed to have been effected on the following day.

ORDER XLIV

COMMISSIONS

1. Order XXVI in the First Schedule to the Code with respect to commission shall apply except rules 13, 14, 19, 20, 21 and 22.

NOTES

Scope of the Rule:—This rule makes the provisions of O. 26, C. P. C. (excepting rules 13, 14, 19 to 22) applicable to the Supreme Court. Rules 13 and 14 of O. 26, C. P. C., relate to commission to make partitions while rules 19 to 22 relate to commission issued at the instance of Foreign Tribunals.

Order 26, C. P. C. as modified by this Rule in its application to the Supreme Court runs as under:—

ORDER XXVI, C.P.C.

Commission

Commissions to examine witnesses

1. Any Court may in any suit issue a commission for the examination on interrogatories or otherwise of any person resident within the local limits of its jurisdiction who is exempted under this Code from attending the Court or who is from sickness or infirmity unable to attend it.

2. An order for the issue of a commission for the examination of a witness may be made by the Court either of its own motion or on the application, supported by affidavit or otherwise, of any party to the suit or of the witness to be examined.

3. A commission for the examination of a person who resides within the local limits of the jurisdiction of the Court issuing the same may be issued to any person whom the Court thinks fit to execute it.

4. *(1)* Any Court may in any suit issue a commission for the examination of—

(a) any person resident beyond the local limits of its jurisdiction ;

(b) any person who is about to leave such limits before the date on which he is required to be examined in Court ; and

(c) any person in the service of the Government who cannot in the opinion of the Court, attend without detriment to the public service.

(2) Such commission may be issued to any Court, not being a High Court, within the local limits of whose jurisdiction such person resides, or to any pleader or other person whom the Court issuing the commission may appoint.

(3) The Court on issuing any commission under this rule shall direct whether the commission shall be returned to itself or to any subordinate Court.

5. Where any Court to which application is made for the issue of a commission for the examination of a person residing at any pl ce not within India is satisfied that the evidence of such person is necessary, the Court may issue such commission or a letter of request.

6. Every Court receiving a commission for the examination of any person shall examine him or cause him to be examined pursuant thereto.

7. Where a commission has been duly executed, it shall be returned, together with the evidence taken under it, to the Court from which it was issued, unless the order for issuing the commission has otherwise directed in which case the commission shall be returned in terms of such order; and the commission and the return thereto and the evidence taken under it shall (subject to the provisions of the next following rule) form part of the record of the suit.

8. Evidence taken under a commission shall not be read as evidence in the suit without the consent of the party against whom the same is offered, unless—

(a) the person who gave the evidence is beyond the jurisdiction of the Court, or dead or unable from sickness or infirmity to attend to be personally examined, or exempted from personal appearance in Court, or is a person in the service of the Government who cannot, in the opinion of the Court, attend without detriment to the public service, or

(b) the Court in its discretion dispenses with the proof of any of the circumstances mentioned in clause *(a)*, and authorises the evidence of any person being read as evidence in the suit, notwithstanding proof that the cause for taking such evidence by commission has ceased at the time of reading the same.

Commissions for local investigations

9. In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market value of any property, or the amount of any mesne profits or damages or annual net profits, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court :

Provided that, where the State Government has made rules as to the persons to whom such commission shall be issued, the Court shall be bound by such rules.

10. *(1)* The Commissioner, after such local inspection as he deems necessary and after reducing to writing the evidence taken by him, shall return such evidence, together with his report in writing signed by him to the Court.

(2) The report of the Commissioner and the evidence taken by him (but not the evidence without the report) shall be evidence in the suit and shall form part of the record; but the Court or, with the permission of the Court, any of the parties to the suit may examine the Commissioner personally in open Court touching any of the matters referred to him or mentioned in his report, or as to his report, or as to the manner in which he has made the investigation.

(3) Where the Court is for any reason dissatisfied with the proceedings of the Commissioner, it may direct such further inquiry to be made as it shall think fit.

Commissions to examine accounts

11. In any suit in which an examination or adjustment of accounts is necessary, the Court may issue a commission to such person as it thinks fit directing him to make such examination or adjustment.

12. *(1)* The Court shall furnish the Commissioner with such part of the proceedings and such instructions as appear necessary, and the instructions shall distinctly specify whether the commissioner is merely to transmit the proceedings which he may hold on the inquiry, or also to report his own opinion on the point referred for his examination.

(2) The proceedings and report (if any) of the Commissioner shall be evidence in the suit, but where the Court has reason to be dissatisfied with them, it may direct such further inquiry as it shall think fit.

General provisions

15. Before issuing any commission under this Order, the Court may order such sum (if any) as it thinks reasonable for the expenses of the commission to be, within a time to be fixed, paid into Court by the party at whose instance or for whose benefit the commission is issued.

16. Any Commissioner appointed under this Order may, unless otherwise directed by the order of appointment,—

(a) examine the parties themselves and any witness whom they or any of them may produce, and any other person whom the Commissioner thinks proper to call upon to give evidence in the matter referred to him;

(b) call for and examine documents and other things relevant to the subject of inquiry;

(c) at any reasonable time enter upon or into any land or building mentioned in the order.

17. *(1)* The provisions of this Code relating to the summoning, attendance and examination witnesses, and to the remuneration of, and penalties to be imposed upon, witnesses, shall apply to persons required to give evidence or to produce documents under this order whether the commission in execution of which they are so required has been issued by a Court situate within or by a Court situate beyond the limits of India and for the purposes of this rule the Commissioner shall be deemed to be a Civil Court.

(2) A commissioner may apply to any Court (not being a High Court) within the local limits of whose jurisdiction a witness resides for the issue of any process which he may find it necessary to issue to or against such witness, and such Court may, in its discretion, issue such process as it considers reasonable and proper.

18. *(1)* Where a commission is issued under this Order, the Court shall direct that the parties to the suit shall appear before the Commissioner in person or by their agents or pleaders.

(2) Where all or any of the parties do not so appear, the Commissioner may proceed in their absence.

2. An application for the issue of a commission may be made by summons in Chambers after notice to all parties who have appeared or *ex parte* where there has been no appearance.

3. The Commissioner shall, if the Advocate or other person examining a witness so desires, record a question disallowed by the commissioner and the answer thereto, but the same shall not be admitted as evidence until the Court before whom the deposition is put in evidence shall so direct.

4. The Court may, when the commission is not one for examination on interrogatories, order that the commissioner shall have all the powers of a court under Chapter X of the Indian Evidence Act, 1872, to decide questions as to the admissibility of evidence, and to disallow any question put to a witness.

5. Unless otherwise ordered the party at whose instance the commission is ordered to issue, shall lodge in the Court copies of the pleadings in the case within twenty-four hours of the making of the order and those copies shall be annexed to the commission when issued.

6. Any party aggrieved by the decision of the commissioner refusing to admit evidence or allow a question to be put may apply to the Court to set aside the decision and for direction to the Commissioner to admit the evidence or to allow the question but no such application shall be entertained if made later than seven days after the examination of the witness has been closed.

7. After the deposition of any witness has been taken down and before it is signed by him, it shall be read over and where necessary, translated to the witness, and shall be signed by him and left with the commissioner who shall subscribe his name and the date of the examination.

8. Commissions shall be made returnable within such time as the Court may direct.

ORDER XLV

Power to Dispense and Inherent Powers

1. The Court may, for sufficient cause shown, excuse the parties from compliance with any of the requirements of these Rules, and may give such directions in matters of practice and procedure as it shall consider just and expedient.

2. An application to be excused from compliance with the requirements of any of the Rules shall be addressed in the first instance to the Registrar, who shall take the instructions of the Court thereon and communicate the same to the parties, but if in his opinion it is desirable that the application should be dealt with in open Court, he may direct the applicant to lodge it in the Registry, and to serve the other parties with a notice of motion returnable before the Court.

3. The Court may enlarge or abridge any time appointed by these Rules or fixed by any order enlarging time, for doing any act or taking any proceeding, upon such term (if any) as the justice of the case may require, and any enlargement may be ordered, although the application therefor is not made until after the expiration of the time appointed or allowed.

4. The Court may at any time, either of its own motion or on the application of any party, make such orders as may be necessary or reasonable in respect of any of the matters mentioned in rule 8 of Order XXIV of these Rules, may issue summonses to persons whose attendance is required either to give evidence or to produce documents, or order any fact to be proved by affidavit.

5. Nothing in these Rules shall be deemed to limit or otherwise affect the inherent powers of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.

ORDER XLVI

Destruction of Records

1. There shall be an index of the records in every case in the form prescribed below :—

Index of Papers
in
Civil Appeal No. of
(or Criminal Appeal No. or Petition No. or Suit No.

Cause Title

Serial No.	Date of filing the paper in the record	Description of paper	No. of the part to which it belongs	Remarks

2. The record in each case shall be divided into two parts, Part I to be preserved permanently and Part II to be preserved for a period of not less than three and not more than six years as hereinafter provided.

3. Each paper as and when it is filed in the record, shall be numbered and entered in the Index and classified under the appropriate part to which it belongs.

4. The period for which any particular record is to be preserved shall be reckoned from the date of the final decree or order in the proceeding to which the record belongs, and in case a Review is filed against the decree or order, from the date of the final decree or order made on Review. In the case of registers, the period shall be reckoned from the date of the last entry in the Register.

5. The Registrar may direct that any paper assigned to part II be transferred to Part I for being preserved permanently.

6. Records which do not fall under Part I or Part II as classified below, shall be referred to the Registrar who shall decide the part under which they should be included.

7. When any record is ripe for destruction, it shall either be burnt or sold as waste-paper, as the Registrar may in his discretion direct.

8. Where the record is sold as waste-paper, the sale proceeds shall be credited to Government.

9. As soon as a record is destroyed, a note shall be made in the Index against the record showing that it has been dertroyed and the date of destruction.

10. Part I—

The following papers shall be included under Part I (to be preserved permanently) :—

1. Index.
2. Judgment.
3. Decree or Order.
4. Order of costs.
5. Pleadings (plaint, written statement, set off and counter claim).
6. Authenticated copy of the printed record.
7. Petition of appeal.
8. Statement of Case.
9. Original Petitions including special leave petitions and Article 32 petitions.

10. Interlocutory applications other than applications for condonation of delay and other formal applications.
11. Orders on petitions.
12. Reference received under Article 143.
13. Reference received under Article 317 *(1)*.
14. Memorandum of compromise: award of Arbitrators, which results in a decree.
15. Title deeds, if any, remaining unreturned to any party.
16. Any other records or papers which the Registrar may direct to be included in this part.

Registers

1. Minutes Book.
2. Registers of Suits, Civil and Criminal appeals, Article 32 petitions, special leave petitions, special references and miscellaneous petitions.
3. Register of papers received.
4. Rolls of Advocates and enrolment files.

Part II—

The following papers shall be included in Part II and shall be destroyed after a period of three or six years as indicated below :

1. Appearance, Power of Attorney and Vakalat. 2. Affidavits. 3. Taxation files including bills of costs. 4. Register of bills of costs. 5. Despatch Registers.	Six years.
6. Surplus copies of printed records, and of pleadings and petitions. 7. Applications for condonation of delay and such other formal Applications. 8. Correspondence in cases. 9. Unclaimed documents filed by parties other than title deeds. 10. Office notes in the case files. 11. Copies of summons and notices. 12. Copying Register.	Three years.

PART XI

ORDER XLVII

Appeals and other proceedings transferred under clause (4) of Article 374 of the Constitution.

The rules contained in the foregoing Orders shall apply, so far as may be, to all appeals and other proceedings, transferred to the Court under clause (4) of Article 374 of the Constitution and pending in it in respect of all stages subsequent to the transfer.

ORDER XLVIII

Appeals and other Proceedings Transferred under clause (4) of Article 374 of the Constitution

1. Notwithstanding anything contained in the preceding Orders, the rules contained in this Order shall apply to all appeals and other proceedings which stand transferred to the Supreme Court from the Advisory Board, Jammu and Kashmir under clause (4) of Article 374 and which are heard at Srinagar.

2. *(1)* The Chief Justice may from time to time nominate two or more Judges to constitute a Division Bench to perform the duties assigned by these rules to a Division Bench and nominate one of the Judges of the Court sitting at Srinagar to perform the duties assigned to a Single Judge or a Chamber Judge under this Rules.

(2) The sittings of the Division Bench and of the single Judge and a Chamber Judge shall be held at Srinagar as the Chief Justice may, from time to time, direct.

3. A single Judge sitting in Court shall have power to dispose of all pending applications; and a Judge in Chambers may deal with all interlocutory applications:

Provided that any such single Judge or a Judge in Chambers may in his discretion refer any particular matter to the Division Court.

4. Notwithstanding any orders previously made in the course of the proceedings before the Advisory Board, Jammu and Kashmir, every appeal pending before the Court sitting at Srinagar shall be heard by a Division Bench consisting of not less than two Judges.

5. The Court sitting at Srinagar shall have power to direct the hearing of any particular appeal or proceeding before it by the Court sitting at Delhi; and in the event of such a direction being given, the rules contained in the preceding Orders shall be applicable to such proceedings in their further stages, to the exclusion of the provisions in this Order.

6. Notwithstanding anything contained in these Rules, including those in this Order, the Court sitting at Srinagar shall have the power to give such directions and make such orders in procedural matters or otherwise as may be necessary for the ends of justice or to prevent abuse of the process of the Court, in respect of the appeals and proceedings dealt with by it at Srinagar.

7. The Court sitting at Srinagar may permit the use of Urdu language to such extent as it thinks fit in respect of the proceedings or appeals pending before it :

Provided that the Judgments delivered, Decrees passed or Orders made by it shall be in the English language.

8. The duties assigned to, and the powers exercisable by the Registrar under the Rules of the Supreme Court shall respectively be discharged and exercised in respect of all proceedings before the Court sitting at Srinagar by the Duputy Registrar at Srinagar.

9. The Deputy Registrar shall be the Taxing Officer of the Court sitting at Srinagar, and in the Taxation of costs he shall generally be guided by the practice followed by the Advisory Board of Jammu and Kashmir at Srinagar unless the Court in disposing of a matter has ordered the payment of a lump sum for costs.

10. Appeals and applications pending before the Court sitting at Srinagar may be proceeded with at Srinagar either by the party in person or, subject to the next succeeding rule, by a legal practitioner.

The engagement of an Advocate on record is dispensed with, a Senior Advocate may appear and plead without a Junior in respect of all such matters heard at Srinagar.

11. The following classes of legal practitioners will be entitled to act or appear and plead before the Court sitting at Srinagar :

(a) Advocates who have been duly enrolled as Senior or other Advocates of the Supreme Court ;

(b) In Criminal matters, legal practitioners who filed in the Registry of the Advisory Board Srinagar, their Vakalatnama before 14th May 1954 ;

(c) Legal practitioners of the High Court at Srinagar of not less than 10 years' standing who are specially permitted to do so by the Court sitting at Srinagar on payment of Rs. 50.

12. It will not be obligatory for the parties to lodge in the said pending appeals a Statement of the Case as provided in R. 2 of O. 18 Part II of these Rules.

13. In those civil or criminal cases in which the record has not so far been printed, printing will be dispensed with.

First Schedule

Rules as to Printing of Record

1. The Record in appeals to the Supreme Court shall be printed in the form known as Demy Quarto on both sides of the paper with single spacing.

2. The size of the paper used shall be such that the sheet, when folded and trimmed, will be about 11 inches in height and 8½ inches in width.

3. The type to be used in the text shall be Pica type, but Long Primer shall be used in printing accounts, tabular matter and notes. Every tenth line shall be numbered in the margin.

4. Records shall be arrangad in two parts in the same volume, where practicable, *viz.*,—

Part I.—The pleadings and proceedings, the transcript of the evidence of the witnesses, the judgments, decrees, etc., of the courts below, down to the order admitting the Appeal.

Part II.—The exhibits and documents.

5. The Index to Part I shall be in chronological order, and shall be placed at the beginning of the volume.

The Index to Part II shall follow the order of the exhibit mark, and shall be placed immediately after the Index to Part I.

6. Part I shall be arranged strictly in chronological order, *i.e.* in the same order as the index.

Part II shall be arranged in the most convenient way for the use of the Supreme Court, as the circumstances of the case require. The documents shall be printed as far as suitable in chronological order, mixing Plaintiff's and Defendant's documents together when necessary. Each document shall show its exhibit mark, and whether it is a Plaintiff's or Defendant's documents (unless this is clear from the exhibit mark) and in all cases documents relating to the same matter such as :

(a) a series of correspondence, or

(b) proceedings in a suit other than the one under appeal ;

shall be kept together. The order in the Record of the documents in Part II will probably be different from the order of the Index, and the proper page number of each document shall be inserted in the printed Index.

The parties will be responsible for arranging the Record in proper order for the Supreme Court, and in difficult cases counsel may be asked to settle it.

7. The documents in Part I shall be numbered consecutively.

The documents in Part II shall not be numbered, apart from the exhibit mark.

8. Each document shall have a heading which shall consist of the number of exhibit mark and the description of the document in the Index, without the date.

9. Each document shall have a heading which shall be repeated at the top of each page over which the document extends, *viz*:—

Part I

(a) Where the case has been before more than one Court, the short name of the Court shall first appear. Where the case has been before only one Court, the name of the Court need not appear.

(b) The heading of the document shall then appear consisting of the number and the description of the documents in the Index, with the date, except in the case of oral evidence.

(c) In the case of oral evidence, "Plaintiff's evidence" or "Defendant's evidence" shall appear next to the name of the Court and then the number in the Index and the witness's name, with "Examination," "cross-examination" or "re-examination," as the case may be.

PART II

The word "Exhibit" shall first appear and next to it the Exhibit mark and the description of the document in the Index with the date.

Sufficient space shall be left after the heading to distinguish it from the rest of the matter printed on the page.

SECOND SCHEDULE

Fees to Advocates

PART I

		Fee on brief not exceeding	Refresher not exceeding
		Rs.	Rs.
1. Defended Appeals, Suits and References under Articles 143 and 317 (1) of the Constitution.	Senior	800	400
	Junior when not led by Senior and himself pleads.	500	250
	Junior when not pleading but only instructing.	350	175
2. Undefended Appeals ...	One fee	250	No refresher
3. Special Leave Petitions	Senior (if allowed)	300	No refresher
	Junior when not led by Senior and himself pleads	150	
	Junior when not pleading but only instructing.	100	
4. Article 32 Petitions ...	Senior (if allowed)	350	175
	Junior when not led by Senior and himself pleads	200	100
	Junior when not pleading but only instructing	150	75
5. Notices of motion other than Art. 32 Petitions when opposed	Senior (if allowed)	150	No refresher
	Junior	100	
6. Review Petitions in Court ...	Senior (if allowed) ...	150	No refresher
	Junior	100	
7. Opposed applications or investigations in Chambers	One fee	150	
8. Unopposed motions and Chamber applications and Review applications in taxation	One fee	50	
9. Attending taxation ...	One fee	30	

PART II

	Not exceeding Rs.
1. To Junior Advocate for drafting Special Leave Petitions and Petitions under Article 32 of the Constitution inclusive of the affidavits in support of the Petition	
To the Senior for settling Special Leave Petitions and Petitions under Article 32 of the Constitution inclusive of the affidavits in support of the Petition	75
2. To Junior Advocate for drafting other Petitions or affidavits (other than formal petitions like petitions for excusing delay and affidavits in them and affidavits of service)	100
	30

	Not exceeding Rs.
To Senicr Advocate for settling other Petitions or affidavits (other than formal petitions like petitions for excusing delay and affidavits in them and affidavits of service)	60
3. To Junior Advocate for drawing statement of case in Appeals, pleadings in Suit or Special Case :	
When the statement, pleading or special case is settled by Senior	100
When the statement, pleading or special case is not settled by Senior	150
To Senior Advocate for settling statement of case in Appeals, pleadings in suit or special case in consultation with Junior	200
4. *Acting fees* :	
In Appeals (defended and undefended)	200
In Article 32 Petitions	100

Actual postal and telegraph charges where necessary to be allowed in the discretion of the Taxing Officer

PART III

	Rs.	a.	p.	
1. Preparing copies of documents (other than tabulated statements and accounts) whether written or typed, first copy per folio.	0	4	0	Or actual charges incurred
2. Preparing carbon copies of above, if legible, per folio ...	0	2	0	
3. Preparing copies of tabulated statements and accounts, per folio	0	8	0	
4. Preparing carbon copies of above per folio	0	4	0	
5. Preparing lithographed or printed copies per folio for each copy.	0	5	0	
6. Preparing photographed copies				Actual charges
7. Making transcript or copying papers for the press where necessary for preparing paper book, including examination per folio	0	10	0	
8. Printing paper book—Actual cost at a reasonable rate to be allowed by the Taxing Officer				
9. Examining proofs, per folio	0	5	0	

THIRD SCHEDULE

Table of Court Fees

PART I

Original Jurisdiction

	Rs.	a.	p.
1. Filing and registering plaint	250	0	0
2. Filing and registering written statement	50	0	0
3. Filing and registering set-off or counter-claim	50	0	0
4. Reply to a counter-claim	50	0	0
5. Examining & comparing documents with the original, for each folio	0	8	0
6. Reducing into writing or, where taken down in shorthand, transcribing the depositions of witnesses, for each folio	0	10	0
7. Typed copies of transcript of deposition of witnesses for any party:—first copy, per folio	0	8	0
carbon copies, per folio	0	2	0

PART II

Appellate Jurisdiction

1. Petition for special leave to appeal	250	0	0	
2. Lodging and registering Petition of Appeal :				
Where the amount or value of the subject-matter in dispute is Rs. 20,000 or below that sum	250	0	0	
For every Rs. 1,000 in excess of Rs. 20,000	5	0	0	For every thousand rupees or part thereof.

	Rs.	A.	P.
In cases where it is not possible to estimate at a money value the subject matter in dispute	250	0	0
Provided :			
(1) that the maximum fee payable in any case shall not exceed Rs. 2,000 and			
(2) that where an appeal is brought by special leave granted by this Court credit shall be given to the appellant for the amount of court-fee paid by him on the petition for special leave to appeal			
3. Lodging of Case, or Caveat	20	0	0
4. Application for Review of judgment or order of Court	Half the fee paid on the original proceeding		

PART III

Miscellaneous

	Rs.	A.	P.
1. Entering in register of suit, appeals or matters, names of representatives of a deceased party or of a substituted or added party ...	2	0	0
2. Summons or notice to defendant or his representative or a respondent to a petition or to a memorandum of appeal, for not more than five persons, (with an additional fee of Re. 1 for every person in excess of five)	5	0	0
3. Entering Appearance	5	0	0
4. Amending Appearance	5	0	0
5. Vakalatnama	3	0	0
6. Filing fee for every document for which a fee is not specially provided, including documents annexed thereto as exhibits if any, or produced with plaint or used in evidence, each document ...	2	0	0
7. Every application to the Court not specially provided for ...	10	0	0
8. Every application to a judge in Chambers, the Registrar or Taxing Officer not specially provided for	5	0	0
9. Every requisition to draw up an order, including fee for filing the order	5	0	0
10. Warrant, writ, summons or other process not specially provided for, for not more than five persons (with an additional fee of Re. 1 for every person in excess of five)	5	0	0
11. Every certificate or report of a Judge in Chambers or of Registrar on an investigation	10	0	0
12. Every other certificate for which a fee is not specially provided ...	3	0	0
13. Commission to examine witnesses or other commission ...	10	0	0
14. Production by an officer of the Court in any other court or before a Commissioner of records of any suit, matter or appeal, exclusive of travelling expenses	10	0	0
15. For production of records by post, exclusive of postage, registration and insurance fees	5	0	0
16. For every attendance on parties or their Advocates inspecting books and papers in Court	5	0	0
17. For enquiry into sufficiency of security	8	0	0
18. For every search or examination of records	3	0	0
19. Every affidavit affirmed or sworn	2	0	0
20. For every oath or affirmation and administered to witness ...	3	0	0
21. Every exemplification of decree or other document in addition to the folio and other charges	10	0	0
22. Every requisition for duplicate or other copy of any document ...	1	0	0
23. For duplicate and other copies of any document, per folio less requisition fee paid...	0	10	0

	Rs. A. P.
24. For amending pleadings or other proceedings under order of the Court, per folio	2 0 0
25. Upon all moneys or securities paid to the Registrar or deposited with him.	A commission of 1 per cent. and 2½ per cent. on interest drawn on invested money
26. Every requisition for translation	1 0 0
27. Every written translation, per folio, less requisition fee paid ...	2 0 0
28. Summons by Taxing Officer	3 0 0
29. Certificate by Taxing Officer	2 0 0
30. Taxing each bill, not exceeding 10 folios	10 0 0
31. For every other folio	1 0 0
32. Registering every bill of costs	1 0 0
33. Special Certificate of allowance where required	8 0 0
34. Certificate on review of taxation	10 0 0
35. For every certificate of funds in Court	8 0 0

N.B.—In the case of References under Article 143 of the Constitution such of the above fees as may be appropriate shall be charged.

FOURTH SCHEDULE

Fees to Officers of Court

	Rs. A. P.
1. Fees of interpreter for explaining at the house of a party or any place other than the Court House, pleadings and other documents except affidavits or affirmations where not exceeding 20 folios ...	8 0 0
Where over 20 folios, for every 10 folios or part thereof ...	2 8 0
2. Fees of Registrar for taking bonds and of commissioners for taking affidavits or affirmations at the house of a party or any place other than the Court House :	
For the first affidavit, oath or affirmation or bond, where within the limits of the State of Delhi	16 0 0
For the first affidavit oath or affirmation or bond, where beyond such limits	24 0 0
For every affidavit, oath or affirmation or bond taken at the same time and place after the first, in the same suit, appeal or matter	8 0 0
3. Fees of commissioners, for receiving affidavits, oaths or affirmations at the Court House, for every affidavit, Oath or affirmation...	2 0 0
4. Fees of interpreter for explaining bonds affidavits or petitions, at the house of a party or any place other than the Court House. ...	Half the fees allowed to Registrar or Commissioner

FIFTH SCHEDULE

FORMS

No. 1

SUPREME COURT OF INDIA

(Certificate of Enrolment of Advocate)

(S.C.R., Order IV)

No._____

THIS IS TO CERTIFY that

has this day been admitted and enrolled [as a Senior Advocate] [as an Advocate] in the Supreme Court of India.

Dated this the day of , 19 .

Registrar

No. 2

VAKALATNAMA

(S. C. R. Order IV, rule 19)

IN THE SUPREME COURT OF INDIA

APPELLATE/ORIGINAL JURISDICTION

SUIT/APPEAL No.....OF 19.....

PETITION/REFERENCE

Between Plaintiff, Appellant, Petitioner,

and Defendant, Respondent, Opposite Party.

VAKALATAMA

I/We.....(name) Plaintiff (s)/Appellant (s)/Petitioner (s) in the Defendants (s)/Respondent (s)/Opposite Party above Suit/Appeal/Petition/Reference do hereby appoint and retain..... .....Advocate (s) of the Supreme Court to act and appear for me/us in the above Suit/ Appeal/Petition/Reference and on my/our behalf to conduct and prosecute (or defend) the same and all proceedings that may be taken in respect of any application connected with the same or any decree or order passed therein, including proceedings in taxation and applications for Review, to file and obtain return of documents, and to deposit and receive money on my/our behalf in the said Suit/Appeal/Petition/Reference and in applications for Review, and to represent me/us and to take all necessary steps on my/our behalf in the above matter. I/We agree to ratify all acts done by the aforesaid Advocate (s) in pursuance of this authority.

Dated this the ..... date of .....19.....

PLAINTIFF (S)/APPELLANT (S)/PETITIONER (S)

DEFENDANT (S)/RESPONDENT (S)/OPPOSITE PARTY.

Accepted.

(Signed) ————————;

ADVOCATE

The address for the Service of the said Advocate is.....

No. 3

Form of Summons for an Order in Chambers

(S.C.R., Order V)

In the Supreme Court of India

[*Appellate Jurisdiction*]
[*Original Jurisdiction*]
Appeal
——No. of 19 .
Case

[A.B.] [*Appellant*]
[State of A.B.] [*Plaintiff*]

Vs.

[C.D.] [*Respondent*]
[State of C.D.] [*Defendant*]

Let all parties concerned attend before ———————————— in Chambers at the Court House (New Delhi) on the day of 19 , at O' clock in the forenoon on the hearing of an application on the part of the above named plaintiff (*or appellant, defendant, respondent as the case may be*) for an order that [*here state the precise object of the application*].

Dated this the day of 19 .

[Take notice that this summons will be attended by counsel for the applicant.]

(Signed) ————————,
Advocate for the plaintiff.

This summons was taken out by———————————Advocate for the plaintiff.

To

————————————,
Advocate for the defendant.

No. 4

Notice of Appeal from Registrar

(S. C. R., Order V, Rule 3)

In the Supreme Court of India

[*Appellate Jurisdiction*]
[*Original Jurisdiction*]
Appeal
———No. of 19 .
Case
[A. B.] [*Appellant*]
[State of A. B.] [*Plaintiff*]

Vs.

[C. D.] [*Respondent*]
[State of C. D.] [*Defendant*]

Take notice that the above-named plaintiff (*or appellant, respondent, defendant as the case may be*) intends to appeal against the decision of the Ragistrar, given cn the day of (*ordering or refusing to order*) that

And further take notice that you are required to attend before the Judge in Chambers at the Court House, [New Delhi,] on the day of 19 at O'clock in the forenoon, on the hearing of an application by the said plaintiff (*or appellant, respondent, defendant as the case may be*) for an order that (*here state the order sought to be obtained*).

(Signed)———————,
Advocate for the plaintiff.

To

———————
Advocate for the defendant.

———

No. 5

Notice of Motion

(S. C. R., Order VI, Rule 2)

In the Supreme Court of India

[*Appellate Jurisdiction*]
[*Original Jurisdiction*]
Appeal
———No. of 19 .
Case
[A. B.] [*Appellant*]
[State of A. B.] [*Plaintiff*]

Vs.

[C. D.] [*Respondent*]
[State of C. D.] [*Defendant*]

Take notice that the Court will be moved on the day of 19 , at O'clock in the forenoon, or so soon thereafter as counsel can be heard, by Mr. ———————, counsel for the above-named plaintiff (*or defendant, appellant, respondent as the case may be*), that (*or for an order that, or for*) (*here state the precise object of the motion, as thus* : this action may stand dismissed for want of prosecution).

Dated this the day of 19 .

(Signed) ———————,
Advocate for the plaintiff.

To

———————
Advocate for the defendant.

———

No. 6

Form of Oath by Translator

(S. C. R., Order VII, Rule 4)

In the Supreme Court of India

In the matter of , a translator.

I, solemnly affirm and say that I will translate correctly and accurately all documents given to me for translatic n.

Dated this the day of

Before me.
Ragistrar.

———

No. 7

Application for Production of Records

(S. C. R., Order IX)

In the Supreme Court of India

[*Appellate Jurisdiction*]
[*Original Jurisdiction*]
Appeal
———No. of 19 .
Case
[A. B.] [*Appellant*]
[State of A. B.] [*Plaintiff*]

Vs.

[C. D.] [*Respondent*]
[State of C. D.] [*Defendant*]

To

The Registrar, Supreme Court of India.

Sir,

Please produce the records of the within mentioned case before

(*here insert the number and title of the case of which the records are required.*)

Dated this the day of 19 .

(Signed)———————

———

No. 8

Notice to parties of the day fixed for Delivery of Judgment

(S. C. R., Order X, Rule 1)

In the Supreme Court of India

[*Appellate Jurisdiction*]
[*Original Jurisdiction*]
Appeal
——— No. of 19 .
Case
[A.B.] [*Appellant*]
[State of A.B.] [*Plaintiff*]

Vs.

[C.D.] [*Respondent*]
[State of C.D.] [*Defendant*]

To

(Names of parties or their Advocates)

Take notice that the Court will deliver judgment in the above-mentioned appeal (case) on the day of 19 , at O'clock in the forenoon, or so soon thereafter as may be convenient to the Court.

Dated this the day of 19 .

Registrar.

———

No. 9

Notice to Respondent of Lodging of Appeal

(S. C. R., Order XXI, Rule 5)

In the Supreme Court of India

[*Appellate Jurisdiction*]

Criminal Appeal No. of 19 .

Appeal from the judgment (order, sentence or decision) of the High Court of Judicature / Court or Tribunal at

[A.B] [*Appellant*]

Vs.

[The State] [*Respondent*]

To

The Attorney-General for India and/or / The Advocate-General concerned

Take notice that an appeal from the judgment (order, sentence or decision of the High Court of Judicature at dated the of Court 19 , in Case No.

(here give number of Case in High Court, or Judicial Commissioner's Court)
was presented by the above-named appellant on the day of 19 , and has been registered in this Court as Criminal Appeal No. of 19 .
Dated this the day of 19 .

Registrar.

No. 10

Memorandum of Appearance in Person

(S. C. R., Order XVI, Rule 16)

In the Supreme Court of India

[*Appellate Jurisdiction*]

Appeal No. of 19 .

[A.B.] [*Appellant*]

Vs.

[C.D.] [*Respondent*]

To

The Registrar.

Please enter an appearance for the respondent above-named in this appeal.

Dated this the day of 19 .

(Signed)_____,

Address for Service.

No. 11

Notice to Parties of the day fixed for hearing of Appeal

(S. C. R., Order XIX, Rule 2)

In the Supreme Court of India.

[*Appellate Jurisdiction*]

Appeal No. of 19 .

[A.B.] [*Appellant*]

Vs.

[C.D.] [*Respondent*]

To

(Names of parties or their Advocates)

Take notice that the above appeal is fixed for hearing on the day of 19 , and shall be taken up for hearing by the Court on that day at O'clock in the forencon or so soon thereafter as may be convenient to the Court.

Dated this the day of 19 .

Registrar.

No. 12

Summons for Disposal of Suit

(S. C. R., Order XXIV, Rule 1)

In the Supreme Court of India

[*Original Jurisdiction*]

Case No. of 19 .

[State of A. B.] [*Plaintiff*]

Vs.

[State of C. D.] [*Defendant*]

PRESIDENT OF INDIA, *i.e.* BHARAT

To

WHEREAS the above-named plaintiff has instituted a suit in this Court against you claiming——— you are hereby required to cause an appearance to be entered for you in the Registry of the Court within twenty-eight days from the service upon you of this summons, exclusive of the day of such service; and you are summoned to appear before this Court by an Advocate of the Court to answer the plaintiff's claim on the day the case is set down for hearing upon which date you must be prepared to produce all your witnesses and all documents in your possession or power upon which you intend to rely in support of your case.

And you are hereby required to take notice that in default of your causing an appearance to be so entered, the suit will be liable to be heard and determined in your absence.

Witness Chief Justice of India,* the day of in the year one thousand nine hundred and

Advocate.

Address: *At the Supreme Court, New Delhi.

Registrar.

No. 13

Memorandum or Appearance through Advocate
(S. C. R., Order XVI)
In the Supreme Court of India

[*Appellate Jurisdiction*]
[*Original Jurisdiction*]

Appeal
——————No. of 19 .
Case

[A. B.] [*Appellant*]
[State of A. B.] [*Plaintiff*]

Vs.

[C. D.] [*Respondent*]
[State of C. D.] [*Defendant*]

To

The Registrar,

Please enter an appearance for the above-named Respondent (or the *defendant* in this appeal case.

Dated this the day of 19 .

(Signed)——————————
Advocate for the Respondent

No. 14

Notice of Appearance
(S. C. R., Order XXIV, Rule 7)
In the Supreme Court of India

[*Original Jurisdiction*]

Case No. of 19 .

[A. B.]
[State of A. B.] [*Plaintiff*]

Vs.

[C. D.]
[State of C. D.] [*Defendant*]

To

(*The plaintiff or his Advocate*)

Take notice that appearance has been entered for the above-named defendant in this case.

Dated this the day of 19 .

(Signed)——————————
Advocate for the defendant

No. 15

Summons for Directions
(S. C. R., Order XXIV, Rule 8)
In the Supreme Court of India

[*Original Jurisdiction*]

Case No. of 19 .

[A. B.]
[State of A. B.] [*Plaintiff*]

Vs.

[C. D.]
[State of C. D.] [*Defendant*]

Let all parties concerned attend, in Chambers at the Court House (New Delhi) on the day of 19 , at O'clock in the forenoon on the

hearing of an application by the plaintiff for directions in this action as follows :—
[*The applicant should specifically state what he applies for, and strike out what he does not apply for*]

Pleadings	[*Here state the directions required ; as thus* That the plaintiff may be at liberty to amend his statement of claim by (*state amendments proposed*), and generally as he may be advised]
Particulars	
Admission of documents and facts ...	
Discovery	
Interrogatories	
Inspection and production of documents ...	
Inspection of real or personal property ...	
Commissions	
Examination of witnesses	
Place of trial	
Mode of trial	

Dated this the day of 19 .

Registrar.

This summons was taken out by

. ————Advocate for the plaintiff

To

_____ ,

Advocate for the defendant

———

No. 16

Notice of Payment of Money into Court

(S. C. R., Order XXXIII)

In the Supreme Court of India

[*Original Jurisdiction*]

[A. B.] Case No. of 19 .

[State of A. B.] [*Plaintiff*]

[C. D.] *Vs.*

[State of C. D.] [*Defendant*]

Take notice that the defendant has paid into Court Rs.
and says that (Rs. part of) that sum is enough to satisfy the plaintiff's claim (for and Rs.
the other part of that sum is enough to satisfy the plaintiff's claim for) and admits (but denies) liability therefor.

Dated this the day of 19 .

(Signed)_____
Advocate for defendant
Address

To

_____
Advocate for plaintiff
Address

———

No. 17

Acceptance of sum paid into Court

(S. C. R., Order XXXIII)

In the Supreme Court of India.

[*Original Jurisdiction*]

Case No. of 19 .

[State of A. B.] [*Plaintiff*]

Vs.

[State of C. D.] [*Defendant*]

The plaintiff accepts the sum of Rs. paid by the defendant into Court in satisfaction of the claim in respect of which it was paid in (and abandons his other claims in this action).

Dated this the day of 19 .

(Signed)_____
Advocate for the plaintiff .
Address

To

_____
Advocate for the defendant
Address

———

No. 18

Notice to the Attorney-General for India of Special Reference under Article 143 of the Constitution of India

(S. C. R., Order XXXVI)

In the Supreme Court of India

Special Reference No of 19 .

In the matter of a Special Reference under Article 143 of the Constitution of India.

PRESIDENT OF INDIA, *i. e.* BHARAT

To

The Attorney-General of India.

Whereas under Article 143 of the Constitution of India, the President has referred the following question (s) of law (or fact) for consideration and report to this Court:—

[*Here set out the question or questions referred.*]

Take notice that you are hereby required to appear before this Court on the day of 19 , at o'clock in the forenoon to take the directions of the Court in the matter.

Witness Chief Justice for India, the day of in the year one thousand nine hundred and

Registrar

No. 19

Notice to parties of Special Reference under Article 143 of the Constitution of India

(S. C. R., Order XXXVI)

In the Supreme Court of India

Special Reference No. of 19 .

In the matter of (*here state the subject matter under reference)*

and

In the matter of a Special Reference under Article 143 of the Constitution of India.

PRESIDENT OF INDIA, *i. e.* BHARAT

To

(Names of Parties)

Whereas under Article 143 of the Constitution of India, the President has referred the following question (s) of law (or fact) for consideration and report to this Court:—

(*Here set out the question or questions referred*)

Take notice that you are hereby required if you desire to be heard to cause an appearance to be entered for you in the Registry of this Court on or before the day of 19 , and to attend on the said day at O'clock in the forenoon before the Registrar by an Advocate of the Court to take the directions of the Court with respect to statements of facts and arguments and with respect to the date of the hearing.

Witness ; Chief Justice of India, the day of in the year one thousand nine hundred and

Registrar

No. 20

Summons to attend Taxation

(S.C.R., Order XL, Rule 14)

In the Supreme Court of India

[*Appellate Jurisdiction*]
[*Original Jurisdiction*]
Appeal
_____No. of 19 .
Case
[A.B.]
[State of A.B.] [*Appellant*]
[*Plaintiff*]
[C.D.] *Vs.*
[State of C.D.] [*Respondent*]
[*Defendant*]
Bill No. of 19 .

Here state the names of the parties to the bill.

Whereas Shri E.F.—Advocate for the appellant [*or as the case may be*] has lodged a bill of coste (copy appended hereto) for taxation as between [party and party and also aa

between] Advocate and client, notice is hereby given that the Taxing Officer of the Court will proceed to tax the said bill on the day of 19 , at O'clock in the forenoon [afternoon] when you may attend the Taxing Officer in his Chambers at the Court House and contest the said bill or any items therein.

Dated this the day of 19 .

Taxing Officer

No. 21

Certificate of Taxation

(S.C.R., Order XL)

In the Supreme Court of India

[*Appellate Jurisdiction*]
[*Original Jurisdiction*]
Appeal
——No. of 19 .
Csse

[A.B.] [*Appellant*]
[State of A.B.] [*Plaintiff*]

Vs.

[C.D.] [*Respondent*]
[State of C.D.] [*Defendant*]
Bill No. of 19 . *Here state the names of the parties to the bill.*

I do hereby certify that I have taxed the above bill of costs, lodged in this Court by Shri E.F., Advocate for appellant [*or as the case may be*] and do allow, as between party and party the sum of [amount in figures and words].

Dated this the day of 19 .

Taxing Officer

No. 22

Notice of Proceedings to Attorney-General for India or Advocate-General (of a State)

(S.C.R., Order XLI, Rule 1)

In the Supreme Court of India

[*Appellate Jurisdiction*]
[*Original Jurisdiction*]
Appeal
——No. of 19 .
Case

[A.B.] [*Appellant*]
[State of A.B.] [*Plaintiff*]

Vs.

[C.D.] [*Respondent*]
[State of C.D.] [*Defendant*]

To

The Attorney-General for India

or

Advocate-General of a State.

Take notice that the above-named appeal/case has been filed in this Court [and is fixed for hearing on the day of 19 , and shall be taken up for hearing by the Court on that day, at O'clock in the forenoon, or so soon thereafter as may be convenient to the Court] [and shall be fixed for hearing on a suitable date of which due notice will be given to you.]

As the appeal/case raises [an] important question (s) [here state briefly the question (s) involved] notice is hereby given to you so that you may appear and take such part in the proceedings before this Court as you may be advised.

Dated this the day of 19 .

Registrar.

No. 23

Affidavit of Service of Summons

(S.C.R., Order XL, Rule 15)

In the Supreme Court of India

[*Appellate Jurisdiction*]
[*Original Jurisdiction*]
Appeal
——No. of 19 .
Case
[A.B.] [*Appellant*]
[State of A.B.] [*Plaintiff*]

Vs.

[C.D.] [*Respondent*]
[State of C.D.] [*Defendant*]

I, of , Advocate for the abovenamed , make oath/solemnly affirm and say as follows :—

I did on the day of 19 , serve Mr. , Advocate for the above-named in this action [or appeal] with a true copy of the summons now produced and shown to me marked A, by leaving it, before of four* in the afternoon at the [office or dwelling house] of the said situate being the address for service in this action [or appeal] [with his clerk or his servant or as may be there] or by posting it at the post office at in a duly registered envelope addressed to the said at , being the address for service in this action [or appeal].

Sworn at this day of 19 .
Before me.
This affidavit is filed on behalf of the

——

No. 24

Affidavit of Service by Post

(S. C. R., Order XL, Rule 15)

In the Supreme Court of India

[*Appellate Jurisdiction*]
[*Original Jurisdiction*]
Appeal
——No. of 19 .
Case
[A.B.] [*Appellant*]
[State of A.B.] [*Plaintiff*]

Vs.

[C.D.] [*Respondent*]
[State of C.D.] [*Defendant*]

I, , Advocate for the above-named , make oath/solemnly affirm and say as follows :

I did serve the Advocate for the above-named in this action [or appeal] [or the above-named if he has appeared in person] with the summons [or notice or other documents] now produced and shown to me marked A, by posting it on the day of 19 , at (name of post office) a true copy of the said summons (*or as may be*) in a prepaid envelope registered for acknowledgment addressed to the said Advocate [*or respondent or as may be*] at , which is his address for service.

The postal acknowledgment is attached hereto.

Sworn at this day of 19 .
Before me.
This affidavit is filed on behalf of the

——

No. 25

Writ of Commission

(S. C. R., Order XLIV)

In the Supreme Court of India

[*Original Jurisdiction*]

Case No. of 19 .

[A.B.]
[State of A.B.] [*Plaintiff*]

Vs.

[C.D.]
[State of C.D.] [*Defendant*]

PRESIDENT OF INDIA, *i.e.* BHARAT

To

The Commissioner appointed to examine the undermentioned witnesses on behalf of

I, , President of India hereby appoint you and give you full power and authority to swear or affirm and diligently to examine on interrogatories and *viva voce* as shall be produced before you as witness (es) on behalf of the said in a certain Case No. of now pending in the Supreme Court (wherein) and I further command you that you do at certain days and places to be appointed by you for that purpose of which reasonable notice shall be given to all parties cause the said witness (es) to come before you and then and there examine and cross-examine such witness (es) either upon oath or solemn affirmation which we hereby give you full power and authority to administer to such witness in the form firstly specified at the foot hereof, and that you do take such examination and reduce the same into writing on paper ; and when you shall have so taken the same you are to send the same before the [returnable date as given in the order for the issue of this commission] to the Registrar of the said Supreme Court closed up under your Seal together with such documents as shall be spoken to and marked exhibits and this writ.

And I further empower you to appoint if necessary, a competent interpreter to interpret such of the proceedings under this commission as you may deem necessary to have interpreted from or into the English language. And I further command you that the interpreter employed in interpreting the depositions of the said witness (es) to be examined by virtue of this writ shall, before he be permitted to act as such interpreter as aforesaid take the oath or affirmation lastly specified at the foot hereof which I hereby give you power and authority to administer to such interpreter. And I do lastly order that the parties to this suit do appear before you in person or by their pleaders.

Witness.

Chief Justice of India, at the Supreme Court, New Delhi, the day of in the year one thousand nine hundred and

Advocate for

Advocate for

[Names of witnesses to be examined]

Registrar.

Note 1. — The Commissioner shall not be bound to execute this commission unless such a sum as he thinks reasonable be deposited with him for the expenses of executing the same and also of summoning the witnesses and defraying their travelling and other expenses.

Note 2. — After the deposition of any witness has been taken down, and before it is signed by him, it shall be distinctly read over, and, where necessary, translated to the witness in order that mistakes or omissions may be rectified or supplied. The deposition shall be signed by the witness and left with the Commissioner who shall subscribe his name and date of the examination,

Form of the oath or affirmation to be administered to the witness

I swear in the presence of Almighty God [or solemnly affirm] that the evidence which I shall give in this case shall be true, that I will conceal nothing, and that no part of my evidence shall be false.

So help me God

Form of the oath or affirmation to be administered to the interpreter

I swear in the presence of Almighty God [or solemnly affirm] that I understand and speak the and English languages, and that I will well and truly and faithfully interpret, translate and explain to the witness to be produced before the Commissioner, all questions and answers and all such matters as the Commissioner may require me to interpret and explain.

So help me God

N.B.—The words "so help me God" are to be omitted when an affirmation is administered.

The execution of this commission appears by the Schedule hereunto annexed.

———

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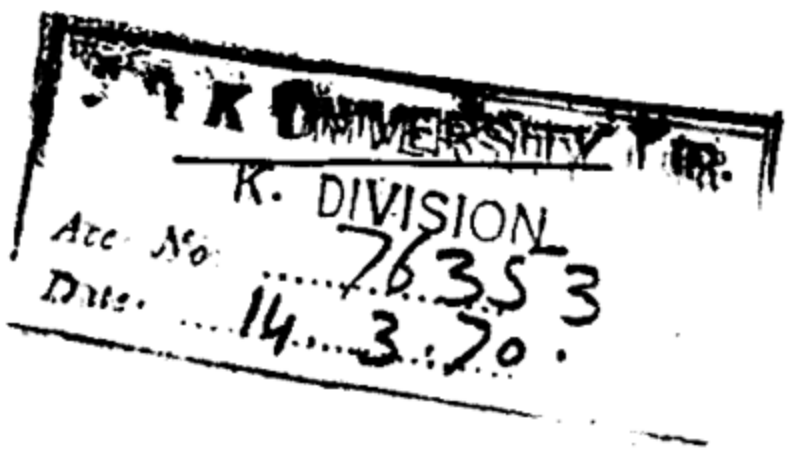
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